Petition

81-1105

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN RE RUSSEL F. HOEHN

Petitioner.

PETITION FOR EXTRAORDINARY WRITS

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December 7, 1981

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TO: THE HONORABLE CHIEF JUSTICE AND
THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE
UNITED STATES

The Petitioner, Russel F. Hoehn, respectfully prays that a Writ of Mandamus and a Common Law Writ of Certiorari under Rule Twenty-seven (27) issue to review various Orders of the Honorable Anne E. Thompson, United States District Judge, United States District Court

For the District of New Jersey, and for such other relief the Supreme Court deems proper.

QUESTIONS PRESENTED

1. Will the United States Supreme Court continue to enforce its interpretation of the Seventh Amendment right to trial by jury as it is expressed in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), and in Dairy Queen v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), and issue a Writ of Mandamus to enforce this right to trial by jury on behalf of the Petitioner?

2. Will the United States Supreme Court issue a Common Law Writ of Certiorari to review the actions of the District Court which granted summary judgment to defendant R. J. Reynolds Industries, Inc. on all counts of the amended complaint and which refused to permit petitioner the right to file a second amended complaint?

OPINIONS BELOW

No opinion was rendered by the United States Court of Appeals for the Third Circuit when it denied a Petition for Mandamus. The opinions rendered and the Orders entered by the United States District Court for the District of New Jersey, Honorable Clarkson S. Fisher, Chief Judge, and Honorable Anne E. Thompson, United States District Judge, appear in the Appendix hereto.

PARTIES

A. Petitioner:

Russel F. Hoehn

B. Respondents:

Honorable Anne E. Thompson,
United States District Judge,
United States District Court
for the District of New Jersey
Sea-Land Service, Inc.
McLean Industries, Inc.

R. J. Reynolds Industries, Inc.

The Retirement Board, McLean Industries, Inc.

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JURISDICTION

The jurisdiction of the United States Supreme Court is invoked under 28 USCA § 1651.

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(a) Joinder of Claims.

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(c) Motion and Proceedings Thereon.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

General Rule 12-I

TEXT SET FORTH IN APPENDIX

STATEMENT OF THE CASE

This action was begun by filing a complaint in the United States District Court for the District of New Jersey in May 1978. The jurisdiction of the District Court was obtained by filing a complaint under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §1003 et seq, § 1132 (hereinafter ERISA). (Pa-111)

This action may be summarized as follows: The plaintiff, Russel F. Hoehn, was an employee of the defendant Sea-Land, which was a wholly owned subsidiary of the defendant, McLean Industries, Inc. (Pa-112) Prior to the conduct complained of in this action, the defendant, McLean Industries, Inc., was sold to the defendant, R. J. Reynolds Industies, Inc.

The then Chairman of the Board of the defendant Sea-Land, Malcolm McLean, (Pa-113) arranged to send plaintiff Hoehn to Alaska to start an ocean shipping line between Alaska and the West Coast of the lower forty-eight

states. Before Hoehn was sent to Alaska, Sea-Land did not have any business on these routes.

Hoehn did not operate as an employee of Sea-Land or of any of the defendants in Alaska, but rather as the proprietor of his own business in which he owned all of the stock and which he controlled subject to a contract between himself, his wholly owned corporation, and the defendant Sea-Land. Under the terms of his contract, he was given the right to use the trade name of Sea-Land as a part of the name of his corporation, Sea-Land Sales of Alaska, Inc.

The business, under his direction, became very profitable. (Pa-114) This profitability and success brought about great jealousy on the part of certain officers of defendant, Sea-Land. It also presented them with the opportunity to take over this business, pour its profits directly into the defendant Sea-Land, and thereby ingratiate themselves to the directors of the defendant Reynolds, which by then was the ultimate

recipient of all of the profits of Sea-Land.

By means of deception, two of these officers, by the name of Hiltzheimer and Baker, falsely represented to the plaintiff that he had no choice but to give up his business in exchange for either a paltry sum of $20,000. in cash or for a full-time position with the defendant, Sea-Land. Under this threat, the plaintiff Hoehn agreed to give up his business and take a full-time position with defendant Sea-Land, only if he would be paid a salary commensurate to what he would have been earning had he remained with Sea-Land and also that he would be, in effect, reinstated in the Sea-Land Pension Plan which had continued in operation as the Pension Plan of McLean Industries.

Hoehn gave up his profitable business in Alaska, returned to the United States and became an employee of the defendant Sea-Land once again. Since he had not received written confirmation of his pension rights, he continued to press various agents of the defendants. (Pa-115-116; Pa-129-135) At first,

he was able to get no satisfaction at all. Then he was informed that it would be impossible for him to be made a member of the McLean Retirement Plan and credited for services he rendered in Alaska. Finally, it was agreed that he would not be made a member of the plan as such, but, in effect, a private pension plan would be set up for him by contract. In other words, he would be paid a pension which would be computed as if he had been a member of McLean-Reynolds Plan during the years he had served in Alaska. (Pa-5-6; Pa-129)

A dispute arose over the amount of pension base. (Pa-117-118) It is this dispute that is responsible for the present lawsuit. No trial date has been set.

Hoehn contends that the provisions of ERISA had been violated because a promised pension right, which had vested by contract, had been denied him in part. (Pa-120) He also asserts that since he was promised the pension as a part of his consideration for giving up his business in Alaska, (Pa-3) and

he did not receive it, there was a failure of consideration which entitles him, according to law, at his sole option, to either insist on payment of the benefits to which he was entitled under ERISA, or in the alternative, to completely reject the original contract for failure of consideration and to seek restitution based upon the theory of unjust enrichment. (Pa-123-124)

Furthermore, Hoehn contends that he was defrauded by the representations of the employees of Sea-Land (Pa-120-121) and that the defendant Reynolds participated in this fraud. Additionally, plaintiff Hoehn asserts that the termination of his contract amounted to a wrongful interference with an advantageous business relationship which is actionable as a business tort and may give rise to punitive or exemplary damages.(Pa-124-125) F.R.C.P.38(b)

Plaintiff has demanded a trial by jury on all of these actions since they are actions at law rather than equity. (Pa-126)

On July 23, 1979 various motions of the defendants were argued before the Honorable

Clarkson S. Fisher, Chief Judge of the United States District Court for the District of New Jersey. The defendants' motions were:

1. To dismiss for lack of subject matter jurisdiction;

2. Failure to state a claim upon which relief may be granted as to all defendants, except Sea-Land;

3. Alternatively, all defendants moved for summary judgment on all four counts of the complaint;

4. Discovery of plaintiff's income tax returns for 1964-71.

Judge Fisher wrote an opinion dated August 13, 1979 (Pa-1-14) in which he granted the defendants' motion to dismiss for lack of subject matter jurisdiction insofar as the complaint was based on diversity of citizenship, but denied such motion as to federal question jurisdiction under ERISA, 29 U.S.C. 1001, et seq.; held the Court had pendent jurisdiction over non-federal claims (Pa-9); denied the motions to dismiss for failure to state a claim (Pa-9-10) and for summary judgment (Pa-10-12;

granted the request for production of plaintiff's income tax returns subject to a protective order and conditions. (Pa-12-13)

Pursuant to general Rule 12 I, the defendants, Reynolds and McLean, moved for reargument and reconsideration of the Court's opinion of August 13, 1979. The application for reargument involved only the motion of Reynolds and McLean to dismiss the complaint against them for failure to state a claim upon which relief can be granted. The Court granted the motion for reargument and denied the defendants' motion. (Pa-18-22) The Court held the complaint alleges that the corporate form of Sea-Land should be ignored and that the complaint fairly presented the issue of piercing the corporate veil for consideration. (Pa-21)

On May 20, 1980, the plaintiff filed an Amended Complaint (Pa-110) in which Counts One through Four were exactly as set forth in the original complaint. Counts Five and Six were added. Count Five (Pa-123) sounds in an unjust enrichment of the defendants to the de-

triment of the plaintiff, arising out of the deliberate interference with a contractual relationship of the plaintiff. Count Six seeks punitive damages for the activities complained of in Count Five (Pa-124), in that the tort was malicious and deliberate.

On January 5, 1981, the District Court, in hearing the various motions of the defendants (Pa-23), reviewed the file and was requested by counsel for plaintiff to take judicial notice of the file entitled, "United States vs. Sea-Land Service, Inc., Criminal No. 8-103" in which case a plea of guilty was entered by Sea-Land before the Honorable H. Curtis Meanor. A corporate resolution (Pa-174-177), authorizing the guilty plea was in the file, and the resolution was that of R. J. Reynolds Industries, Inc. and not that of Sea-Land. The control and domination of Sea-Land by Reynolds is illustrated in this resolution, in that Sea-Land could not plead guilty to its own crimes without the permission of Reynolds to do so, despite the fact that Sea-Land maintains its principal offices

in the State of New Jersey and in the federal district in which it was indicted and entered its plea of guilty.

On January 5, 1981, the trial court heard motions and oral arguments in the within matter and entered an Order on February 13, 1981 (Pa-49-51) as follows:

1. Granting the defendant, R. J. Reynolds Industries, Inc., summary judgment and dismissal as to all counts of the amended complaint;

2. Reserved decision on a motion of defendant, R. J. Reynolds Industries, Inc., for summary judgment on a claim for attorney's fees erroneously labeled a counterclaim;

3. Denied the other defendants' motion to dismiss Count 5 of the amended complaint;

4. Granted the other defendants' motion to dismiss Count 6 of the amended complaint which is a count for punitive damages based upon breach of contract as a result of tortious interference with plaintiff's contractual rights by defendants;

5. Denied plaintiff the right to submit

into evidence at the time of the trial, evidence of a prior plea of "guilty" on behalf of defendant, Sea-Land Service, Inc., in a criminal matter, United States vs. Sea-Land Service, Inc., Criminal No. 78-103, which plea was entered before the Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, and a corporate resolution of R. J. Reynolds Industries, Inc., authorizing the taking of the aforesaid plea of "guilty", and the transcript of the hearing before Judge Meanor in United States vs. Sea-Land Service, Inc. on April 11, 1978 shall not be addressable for any purpose at the trial of the above-captioned matter unless for good cause shown;

6. Ordered that a subpoena of plaintiff issued to and served upon defendant, Sea-Land Service, Inc. on November 19, 1980, is quashed, without prejudice to plaintiff to issue and serve another subpoena upon the said defendant in accordance with the terms of the oral opinion of the Court rendered on January 5, 1981.

The Court having heard the reargument of

the motions, decided on January 5, 1981, the Court issued an Order on March 4, 1981 as follows: (Pa-69-71)

1. The defendants' motion to strike the plaintiff's jury demand was granted as to Counts 1, 3, 4 and 5 of the amended complaint and denied as to Count 2 of the amended complaint;

2. The defendants' motion for summary judgment as to Count 4 of the amended complaint was denied;

3. The defendants' motion for Declaratory Judgment Limiting Liability was denied;

4. The defendants' motion for leave to amend the pretrial order to permit them to obtain an expert witness was granted.

On May 21, 1981, the Court entered an Order as follows: (Pa-95-97)

1. Denying the resettlement of the orders of this Court dated February 13, 1981 and March 4, 1981, which motions requested the Court to enter a final judgment on these orders pursuant to Federal Rules of Civil Procedure (hereinafter F.R.C.P.), § 54 (b),

in order to facilitate taking an appeal of these orders in that an indispensible party was let out on summary judgment, the right to a jury trial provided for under the United States Constitution, Article 7, was abridged and denied and that plaintiff's right to punitive damages for the tortious interference with a contractual relationship was denied, because such cause of action allegedly does not exist under New Jersey law;

2. Ordered that a jury trial be denied the plaintiff as to Count 2 of the amended complaint;

3. Denied the plaintiff's request that the Court dismiss the defendant R. J. Reynolds' "counterclaim" for costs under 29 USCA §1132(g), which is an alleged "counterclaim" for attorney's fees, among other things, and which created an appearance of a lack of final judgment as to R. J. Reynolds;

4. That the motion by plaintiff for reargument of matters cited by the Court in an order entered on February 13, 1981 was denied nuc pro tunc.

Plaintiff filed a Petition for Writ of Mandamus and other Relief with the United States Court of Appeals for the Third Circuit on June 29, 1981, Case No. 81-2080. The Petition was denied on July 2, 1981.

On September 9, 1981 (Pa-100) the trial court heard and denied the plaintiff's motion for leave to file and serve a second amended complaint. The purpose of the proposed amendments was to cure the deficiencies determined by the Court and as set forth by the Orders of February 13, 1981, March 4, 1981 and May 21, 1981. The proposed amendments were needed to more clearly set forth plaintiff's claims against defendants, including defendant, R. J. Reynolds Industries, Inc. An Order was entered denying leave to file and serve such second amended complaint on September 18, 1981. (Pa-108)

REASONS WHY WRITS SHOULD BE GRANTED

POINT I

THE RIGHT TO TRIAL BY JURY IN FEDERAL COURT IS NOT LOST AS TO LEGAL ISSUES MERELY BECAUSE THOSE ISSUES ARE INCIDENTAL TO EQUITABLE ISSUES AND A WRIT OF MANDAMUS WILL ISSUE TO PROTECT RIGHT TO JURY TRIAL.

The basic law, which was spelled out in Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. ed. 2d 44, (1962), is so well settled that one is genuinely surprised to see it raised at this late date.

In Scott v. Neely, 140 U.S. 106, 11 S.Ct. 712 35 L. ed. 315, (1891), this Court held that a Court of equity was prohibited from even taking jurisdiction over a suit where a claim which could be properly resolved only at law was united or joined in the same pleadings with a demand for equitable relief. This decision reflected a combination of the traditional separation of law and equity and the duty of the Court to insure:

> "that the right to a trial by a jury in the

> legal action may be preserved intact". Scott v. Neely, supra, at 110.

A portion of the Scott decision was abandoned when the Federal Rules of Civil Procedure (hereafter F.R.C.P.) were adopted in 1938 and Rule 18(a) was promulgated to permit a joinder of legal and equitable claims in the same pleading. However, this joinder did not change the substantive rights of the parties. It merely provided that one could seek more than one avenue of relief in the same pleading to prevent multiplicity of actions.

As Rule 18(b) goes on to provide:

> "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action, but the Court shall grant the need in that action only in accordance with the relevant substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him

without first having obtained a judgment establishing the claim for money."

However, as this Court points out in Scott v. Neely, supra, the right to a trial by jury to the legal claims must be maintained. This is spelled out in F.R.C.P. 38(a), which explains that a right to a jury trial is guaranteed by the Seventh Amendment to the Constitution and must be preserved inviolate.

Despite this clear-cut position of both the Federal Rules and that of the United States Supreme Court, this Court notes that the adoption of the Rules gave rise to attempts to indirectly deprive parties of their right to trial by jury in Federal Courts whenever there were possibilities of legal and equitable claims being put forward in the same pleading. The method by which this deprivation was accomplished was a determination by the trial court to resolve the equitable issues first and, thus, leave the party with nothing to be tried by a jury. This intolerable situation existed for a number of

years until this Court felt compelled to call it up for review in the case of Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L. ed. 2d 988 (1959). Significantly, the Beacon Theaters case, like the Dairy Queen case and like this case, involved a wrongful denial of a right to trial by a jury. The occasion for this Court's review in Dairy Queen and Beacon Theaters was the denial of Petitions for Mandamus to compel the District Court Judges to vacate orders striking demands for a trial by jury.

In the Dairy Queen case, supra, 369 U. S. 469, at 473, this Court decided that:

> "The holding in Beacon Theaters was that where both legal and equitable issues are presented in a single case, only under the most imperative circumstances, circumstances which in view of the flexible process of the Federal Rules we cannot now anticipate, can the right to trial by jury of legal issues be lost to prior determination of equitable claims." (Emphasis added.)

This Court went on to say, that this holding applies regardless of whether the trial judge chooses to characterize the legal issues as incidental to equitable issues or not.

The situation in the case at bar is far more compelling than that of the Dairy Queen situation. In this case, the trial judge has brushed aside the plaintiff's demands for a trial by jury and even the request for a final order so that an appeal may be taken on the ground that a possibility of reversal of the trial court's decision and a subsequent retrial does not constitute harsh circumstances. Opinion dated May 21, 1981, (Pa-80).

There is not an issue in any of the Counts of the Amended Complaint that cannot be satisfied by a money judgment. The plaintiff is not seeking an injunction, a receivership, the appointment of a Master or any of the other traditional equitable remedies that require supervision by the Court. On each Count of the Complaint, he is asking for

a lump sum of money together with costs, interest and attorney's fees in appropriate cases. Since the plaintiff has adequate remedies at law, it would be improper for him to seek a remedy in equity and, it is equally improper for the defendants to seek to limit his claims to equitable relief.

It seems obvious that there is a demonstrated overpowering constitutional and judicial support for the right to trial by jury and that the trial court is required to resolve every inference in favor of such right. See Beacon Theaters v. Westover, Supra., 359 U.S. 500, 502, 3.

In that case, this Court held that:

> "Maintenance of the jury as a fact-finding body gives of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 95 LR 1150, 36 NCCA 184, L. ed. 603, 611."

Also, in the Beacon Theaters case, supra, 359 U.S. 500, 511, the United States Supreme Court made this point clear as any it has expressed in its reports. The thrust of the Court's opinion was that:

> "Whatever differences of opinion there may be in other types of cases, we think that the right to grant mandamus to require jury trial where it has been improperly denied is settled."

The defendants have persuaded the trial court that the money claim or claims of the plaintiff, regardless of whether they arise under ERISA, quasi-contract or restitution, fraud, breach of contract or wrongful interference with a business relationship, are purely equitable and not triable by a jury. The Dairy Queen case, supra, 369 U.S. 469 at 477, 478, holds that even language containing expressly equitable terms such as "accounting" rather than terms such as an action in "debt" or "damages" does not act to change the basic nature of an action and bar the right to trial by jury.

This Court expressly held that the right to a jury trial:

> "***cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theaters, the absence of an adequate remedy of law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them."

The plaintiff is seeking money damages which can be reduced to sums certain by the documentary evidence, testimony of the witnesses and appropriate expert testimony. This is clearly a case in which a jury, under proper instructions from a Court, can readily determine the amount of damages warranted.

POINT II

AN ACTION IN QUASI-CONTRACT OR RESTITUTION, ALTHOUGH IT HAS ITS ORIGINS IN EQUITABLE PRINCIPLES, REMAINS A LEGAL REMEDY WHICH IS PROPERLY TRIABLE AT LAW BEFORE A JURY.

The origins of the doctrine of quasi-contract or restitution go back to the equitable principle that it was wrong for someone to be unjustly enriched by the money or property of another when he had not given something of value in exchange for that money or property. However, the effect of the doctrine which grew out of the Common Law Doctrine of Special Assumpsit was always a legal and never an equitable action. This view is supported by 12 Williston on Contracts, 3rd Ed. § 1454; by 5 Corbin on Contracts, §1102, §1103. Essentially, these authorities, which sum up case law running from the present day all the way back to the Old Forms of Action in the Thirteenth Century, stand for the well-settled proposition that, while equitable prin-

ciples created the action of restitution, it was, nevertheless, essentially legal and never a matter to be tried in the Court of Equity.

From the earliest days at Common Law, the Courts held that the normal and preferred remedy in all things was an action at law and that a litigant could resort to equity only when he had first demonstrated that he had no adequate remedy at law. An action in restitution clearly can be resolved by a money judgment which is primarily a legal matter. As such, a litigant seeking relief would have no need to seek the extraordinary powers of equity.

Applying this rationale to the facts of this case, particularly to the Fifth Count of the plaintiff's amended complaint, the allegations are that the plaintiff owned a valuable business which was sold to the defendant, Sea-Land. This is the law of the case as determined by Chief Judge Clarkson S. Fisher in his Letter Opinion of August 13, 1979, (Pa-3). Plaintiff further alleges that

he was not paid the consideration he was promised and, consequently, he is entitled to rescind the contract and to claim damages in restitution. His claim that he did not receive the consideration that he was promised makes his action for restitution essentially one in debt. As such, it is clearly a claim that can be resolved at law. It should be noted that, at this point, there can be no question that plaintiff owned a business in Alaska which was sold to the defendant, Sea-Land.

That the law of New Jersey is that actions in quasi-contract or unjust enrichment are actions at law requiring jury trials should they be demanded, is not disputed. See Deskovick v. Porzio, 78 N.J. Super. 82 (App. Div. 1963) and Gould v. Am. Water Wks. Service Co., Inc. et al, 52 N.J. 226 (1968). Both cases refer to trial by jury. The Fifth Count of the plaintiff's Amended Complaint is a legal action triable by a jury under the provisions of the Seventh Amendment of

the Constitution of the United States of America. The District Court may not take away the right to a trial by jury merely because an equitable concept is reflected in the complaint.

POINT III

A PARTY WHO ALLEGES THAT ANOTHER PERSON HAS WRONGFULLY INTERFERED WITH HIS BUSINESS RELATIONSHIP WITH ANOTHER AND HAS DAMAGED HIM BECAUSE OF THIS INTERFERENCE HAS STATED A CAUSE OF ACTION IN TORT WHICH IS RECOGNIZABLE IN NEW JERSEY LAW, IS TRIABLE BY A JURY, AND WHICH MAY GIVE RISE TO A FURTHER CAUSE OF ACTION IN PUNITIVE DAMAGES.

The law of New Jersey recognizes that the right to be free of unfair business practices, including wrongful interference with a business relationship, as well as prospective economic advantages, is a property interest sufficient to warrant protection. A violation of these rights can give rise to a cause of action in tort. The mere fact that such wrongful acts arise out of a contractual relationship should not result in denying the existence of such a cause of action upon the theory that compensatory and punitive or exemplary damages in tort never arise out of a breach of contract.

This is exactly what is alleged in this case. Plaintiff owned a shipping business in Alaska which had a contract with the defendant Sea-Land. Although defendants allege that this contract was terminable at will by either side, there was no indication of dissatisfaction by either party with the contract. Two of the defendants' agents, servants and employees secured a termination of that contract in order to secure their economic advancement by conferring the benefits of the plaintiff's industry and imagination on the defendant Sea-Land and, through it, on the defendant Reynolds.

It is basic law that a tortious interference extends to acts of wrongful interference with a variety of business relationships or advantages which the law recognizes and protects, including existing contractual relations. These relations are protected whether they are oral or written and irrespective of whether they may be enforced legally. It also extends to prospective eco-

nomic advantages and advantageous business relationships.

This is Hornbook law. See CASES AND MATERIALS ON BUSINESS TORTS, by Milton Handler, Professor of Law, Columbia University, The Foundation Press, Inc., 1972.

The case law of New Jersey allows tort recovery for wrongfully inducing a breach of contract. So also with this Court which has held that one who, through his conduct, has induced the breach of a third-party contract is liable in damages. See Angle v. Chicago, St. P.M. & O.R. Co., 151 U.S. 1, 14-15, 14 S. Ct. 240, 38 L. Ed. 55 (1893).

> "...The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service.
>
> "Under these authorities, if the Omaha Company had, by its wrongful conduct, simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages

> sustained thereby. A fortiori, when it not only induces a breach of the contract by the Portage Company, but also disables it from performance."

The intentional doing of a harmful act without justification or excuse is considered to be illegal conduct. If damage results from it, the injured party is entitled to redress. See Van Horn v. Van Horn, 56 N. J.L. 318 (E & A, 1893).

The Courts of New Jersey have held:

> "Broadly speaking, the rule protects 'the right to pursue one's business calling or occupation free from undue interference or molestation." Louis Kamm, Inc. v. Flink, supra, 113 N.J.L., at Page 586. The existence of contract relations between the plaintiff and a third person is not a requisite to an action for interference. It suffices there is "'unlawful interference with prospective economic advantage.'" Longo v. Reilly, supra, 35 N.J. Super. at Page 412; and see Mayflower Industries v. Thor Corp., supra, 15 N.J. Super., at Page 339." See DiCristofaro

v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 253 (App. Div. 1957).

In Louis Kamm, Inc. v. Flink, 113 N.J.L. at Page 582, it was held that malice at law may be inferred from the absence of just cause for the doing of an act which has caused damage to another. See also, Newark Hardware & Plumbing Supply Co. v. Stove Mfrs. Corp., 136 N.J.L. 401, 404 (Sup. Ct. 1948), aff'd. on op. below, 137 N.J.L. 612 (E & A, 1948), where it was held that the malice necessary to estblish a valid cause of action need not be personal ill will. Self enrichment is sufficient. (Emphasis added.)

The District Court granting summary judgment and dismissal of Count Six as to all defendants has in effect held that there is no cause of action for the tortious interference with a business relationship or prospective business relationship. Clearly, the law of New Jersey and of other states is to the contrary. Such a decision by the District Court was not only erroneous but also has the ef-

fect of denying plaintiff the right to a trial by jury. In that Count Six is a matter to be tried under the pendent jurisdiction of the District Court, the dismissal of Count Six of the Amended Complaint should properly be reviewed by the Supreme Court of the United States. No to do so will result in a District Court being able to void the requirements of the law as this Court has set forth in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938). The law to be followed with respect to torts is the law of the State of New Jersey in that there is no federal general common law.

POINT IV

DEFENDANT REYNOLDS WAS IMPROPERLY DISMISSED AS A DEFENDANT BY THE DISTRICT COURT.

Chief Judge Fisher ruled that the allegations of the complaint were sufficient to present the issue of piercing the corporate veil for consideration (Pa-21). Summary judgment was denied to the defendants (Pa-14).

Defendants then moved again for summary judgment on behalf of Reynolds. Defendants offered no affidavits, no discovery or other facts to support their motion. Plaintiff offered a certified copy of a corporate resolution of Reynolds in which Reynolds permits Sea-Land to plead guilty to crimes committed, U.S. vs. Sea-Land (Pa 174-177). Sea-Land does not even have the right to plead guilty to its own crimes and Reynolds, by its Corporate Resolution (Pa 174-177), has pierced the corporate veil of Sea-Land. Sea-Land's corporate form was ignored by Reynolds and should have been by the District Court.

The defendants failed to show there is no genuine issue as to material facts. The issue of Sea-Land's lack of separate existence was properly pleaded by the plaintiff and also controverted by plaintiff even though not denied by defendants. Defendant R.J. Reynolds Industries was not entitled to judgment as a matter of law. See F.R.C.P. 56 (b), (c); Adickes v. Kress Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. ed. 2d. 142 (1970). Also, all factual references must be resolved most favorably for the party opposing the motion. See United States v. Diebolds, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. ed. 2d. 176 (1962); and Ely v. Hall's Motor Transit Co., 59 F.2d 62, 66 (3rd Cir. 1978).

Counts I and II raise a factual dispute. Also, there are two different versions of the McLean Plan before the trial court (Pa-10,11).

Counts III and IV involve a factual inquiry. The allegations of the complaint and factual contentions of the Pretrial Order meet the requirements of F.R.C.P. 9(b) (Pa-11,12).

POINT V

THE TRIAL COURT SHOULD HAVE GRANTED PETITIONER LEAVE TO AMEND AND FILE A SECOND AMENDED COMPLAINT.

An application for leave to amend a complaint should be freely granted at any time prior to the entery of judgment, especially when the proposed amendment does not rest on additional factual material. F.R.C.P. 15(a) states, in part, that:

> "+++otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so required."

The petitioner made application to the District Court for the right to file a Second Amended Complaint which application was denied in the Order of September 18, 1981 (Pa-109).

The purpose of petitioner asking for leave to file a Second Amended Compalint was to cure deficiencies which the District Court found and indicated existed in its prior Or-

ders. The District Court had treated the first Amended Complaint as an old time "Original Writ". The District Court had treated the facts of the first Amended Complaint as deficient and granted summary judgment for defendant Reynolds as to all counts (Pa-49-50), and granted summary judgment as to Count V as to all defendants (Pa-50). The District Court struck the petitioner's right to a trial by jury as to Counts I, III, IV and V of the first Amended Complaint in its Order of March 3, 1981 (Pa-70).

The District Court struck petitioner's right to a jury trial as to Count II of the first Amended Complaint in its Order of May 22, 1981 (Pa-96). The petitioner then decided to move to correct these deficiencies by seeking leave to file a second Amended Complaint which would have reinstated defendant Reynolds as to all Counts, reinstated Count V as a tort count, and reinstated the right to a trial by jury as to the Amended Complaint. This application was denied (Pa-109).

The purpose of modern pleadings is to put a defendant on notice of the claim being made against it. The reason why liberality is commanded by this Court is to bring all material issues before the trial court so that complete justice may be done at one trial, a multiplicity of actions may be avoided, and that problems inherent in estoppel by judgment may not arise. See, Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 92 L. Ed. 2d 222, 226 (1967), where it was held:

> "R. 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Fed. Practice (2d Ed. 1948)....."

See also, Johnson v. AAA Trucking Co., 488 F. Supp. 1347 (E.D. Pa. 1978):

> "The Plaintiff should be afforded the opportunity to test his claim on the merits in the absence of any apparent or declared reasons such as: 1) undue delay, bad faith, or dilatory motive; 2) repeated failure to cure deficiencies; 3) undue prejudice to the opposing

party; or 4) futility
of amendment."

None of the reasons which would prohibit an amendment apply in the instant case.

The amendments will not bring about any undue delay and the application is made in good faith with the purpose being to try the case on its merits. The plaintiff is attempting to cure deficiencies which were determined in the various orders entered in 1981. There are no prejudices to the defendants other than the usual prejudices which attach to being defendants in any legal action. The amendments which are proposed are based upon the concept that the law permits all of the claims to be asserted and consequently they are not futile.

The history of this case shows that the factual nature of the allegations against the defendants were made originally in 1978 and that the allegations of the Fifth and Sixth Counts of the first Amended Complaint did not add any new factual matters. The defendants were apprised of plaintiff's legal theory of

the case all the way through the action, including the hearings held in 1981.

REASONS WHY THE RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT OR THROUGH OTHER APPELLATE PROCESS.

Petitioner, Russel F. Hoehn, seeks relief from the Supreme Court of the United States in the form of the issuance of Extraordinary Writs, in that his timely demand for a jury trial has been denied by the United States District Court for the District of New Jersey and by the United States Court of Appeals for the Third Circuit. Only interlocutory orders have been entered in this matter, and no final judgment has been entered. The District Court has refused to enter a final judgment under the provisions of F.R.C.P. Rule 54(b) and the petitioner contends that defendant, R. J. Reynolds Industries Inc., is properly a party defendant and an indispensible party. The situation at the present time is that the case has been on the docket since May 4, 1978, and although no trial date has been set, it is anticipated one will be set shortly.

The petitioner's constitutional right to a trial by jury as been voided by the District Court, and the petitioner has no avenue of appeal open because of the District Court's refusal to enter a final judgment under F.R.C. P. Rule 54(b). This will result in an undue duplication of effort to retry the case at a later date should the jury trial be granted on appeal, and added imposition on the Court's time when calendars are crowded, unjustifiable added expense to the parties, and duplication of effort on the part of the trial Court, the parties, the witnesses, and counsel. Such being the case, petitioner has no other avenue of relief but to turn to the United States Supreme Court to protect and enforce his constitutional rights and to petition this Court to set the record straight for the purpose of having a fair trial which can be dispositive of these matters once and for all time.

CONCLUSION

Petitioner, Russel F. Hoehn, prays that the United States Supreme Court grant him the following relief:

1. A Writ of Mandamus issue directing the United States District Court to order a jury trial for Petitioner on all counts of the Amended Complaint in order to enforce and protect his constitutional right to a jury trial; and

2. A Common Law Writ of Certiorari issue to review the actions of the United States District Court in dismissing R. J. Reynolds Industries, Inc. as a defendant; in dismissing Count Six of the Amended Complaint; and refusing the Petitioner leave to file a second amended complaint in order to avoid unusual hardship, injustice, a multiplicity of actions, a delay in reaching a conclusion in this legal action, and wasting the time and causing duplication of efforts of the trial court; and

3. Such other relief as the United States Supreme Court deems proper.

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December 7, 1981

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN RE RUSSEL F. HOEHN

Petitioner.

PETITION FOR EXTRAORDINARY WRITS

APPENDIX OF PETITIONER

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Constitution of the United States

Amendment VII - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Code

28 U.S.C.A. § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, §90, 63 Stat. 102.

29 U.S.C.A. § 1132. Civil Enforcement

Persons empowered to bring civil action

(a) A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

29 U.S.C.A. § 1132. Civil Enforcement

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator)

by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C.A. § 1132. Civil Enforcement

Attorney's fees and costs; awards in actions involving delinquent contributions

(g)(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Federal Rules of Civil Procedure

Rule 9. Pleading Special Matters

(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading

within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 18. Joinder of Claims and Remedies

(a) JOINDER OF CLAIMS. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) JOINDER OF REMEDIES, FRAUDULENT CONVEYANCES. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraud-

ulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 38. Jury Trial of Right

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 54. Judgment; Costs.

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim,

or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 56. Summary Judgment.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing

may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

United States District Court for the District of New Jersey - General Rules.

Rule 12.

I. A motion for re-argument shall be served and filed within 14 days after the filing of the court's order or judgment on the original motion. There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be re-argued orally.

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
Clarkson S. Fisher
Chief Judge

Federal Building
Trenton,
New Jersey 08605

August 13th, 1979

NOT FOR PUBLICATION

FILED
August 15, 1979
at 12:15 P.M.
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LETTER OPINION

RE: HOEHN v. SEA-LAND SERVICE, et al.;
Civil Action No. 78-955

Gentlemen:

I. INTRODUCTION

In this case, plaintiff, a retired employee of defendant, Sea-Land alleges that defendants have erroneously computed his retirement benefits and that they have failed

to provide him with a copy of the updated pension plan. Plaintiff also alleges that the defendants have engaged in fraud and malicious misrepresentation by the manner in which they purchased a freight-forwarding business from plaintiff in 1972. Subject matter jurisdiction is invoked pursuant to 29 U.S.C. 1001, "ERISA", and under 28 U.S.C. 1332(a)(1), diversity of citizenship.

The matter is presently before me on defendants' motion to dismiss for lack of subject matter jurisdiction, and for failure to state a claim upon which relief may be granted as to all defendants except Sea-Land. Alternatively, all defendants move for summary judgment on all four counts of the complaint. Defendants also seek discovery of plaintiff's income tax returns for 1964-71. The motions were argued on July 23, 1979, after which I reserved decision.

II. DISCUSSION

Turning to the relevant facts, unlike most other pension plans, plaintiff's retirement benefits were not created as part of a collective bargaining agreement entered into by an employer and a labor union. Rather, any benefits which plaintiff has stem from an individual employment agreement between plaintiff and defendant Sea-Land entered into on December 18, 1972. This agreement was part of a sale by plaintiff of his freight delivery business in Alaska to defendant Sea-Land, and it sets forth the compensation which plaintiff was to receive from defendants for the sale of his business.

A. SUBJECT MATTER JURISDICTION

I think it is clear that there is not complete diversity of citizenship between the parties since both plaintiff and defendant Sea-Land are citizens of New Jersey. The other jurisdictional basis alleged is the ERISA Statute. In support

of its motion to dismiss, defendants maintain that ERISA does not provide subject matter jurisdiction for plaintiff's pension claim since the employment agreement between plaintiff and Sea-Land is not an "employment benefit plan" under ERISA. Preliminarily, it should be noted that defendants have already admitted in their Answer that this Court does have jurisdiction under ERISA. I assume that defendants would amend their Answer to deny that subject matter jurisdiction exists under this statute. In any event, viewing defendants' position on the merits of their argument, I think they construe the ERISA statutory scheme too narrowly. The question raised by this motion is whether an employment contract between an individual employee and the employer, which, by its express terms, incorporates within it the provisions of an existing employee benefit plan, is itself an employee benefit plan. I conclude that it is.

The pension protection afforded to employees under ERISA applies to any "employee benefit plan". 29 U.S.C. 1003(a). An "employee benefit plan" is defined as "... an employee pension benefit plan ...", 29 U.S.C. 1002(3), which in turn is defined as,

> any plan, fund or program ... maintained by an employer ... that by its express terms or as a result of surrounding circumstances ... provides retirement income to employees ...

29 U.S.C. 1002(2)(A).

I believe the employment agreement in question meets the above definition. The fact that the agreement and defendants' existing retirement plan for their other employees, the "McLean Plan", are not one and the same document, is not determinative. The ERISA definition of an employee benefit plan is not limited to a single document. See O'Brien v. Sperry Univac, 458 F.Supp. 1179, 1180 (D.D.C. 1978). It is the content of this agreement which is controlling. Paragraph 2 of the Agreement states

that plaintiff "shall be treated as and deemed to be ... a Participant under the McLean Plan. In ¶ 3(a), the agreement directly incorporates by reference all the terms, provisions and conditions of the McLean Plan. Further, ¶ 3(f) states that any amendment or termination of the McLean Plan will apply with equal force to plaintiff's employment contract with defendant Sea-Land. Finally, according to ¶ 4, the parties' declared intent in entering into this agreement was to make provision whereby plaintiff

> is to receive under the McLean Plan and this Agreement the same rights and sum total of benefits under both that he would have received under the McLean Plan.

I think it clear that the agreement bestowed upon plaintiff all the rights and benefits inuring to an employee of defendants who would be expressly covered under the McLean Plan. Plaintiff must therefore be given the same avenue of relief should he be denied those

pension rights and benefits. Plaintiff has standing to seek redress for breaches of the agreement, since by its terms he is a "participant" in an employee benefit plan who is attempting to recover benefits allegedly due him under the terms of his plan. 29 U.S.C. 1132(a)(1)(B).

If I were to adopt defendants' restrictive reading of the ERISA Statute I would, in effect, be allowing an employer to sidestep the provisions of ERISA simply by entering into particularized employment agreements with an individual worker. In many instances, this would render an employee's pension rights quite illusory and would deny him access to a federal forum. Moreover, to hold that plaintiff can't litigate his pension claim here, while at the same time acknowledging that other employees of defendants could do so, it is likely to lead to inconsistent judicial interpretations of the meaning of the McLean Plan. It is illogical to require plaintiff to press this action as a breach of

contract claim in a state court, when other McLean employees could raise an identical claim under ERISA in a federal district court.

I do not believe any of the cases cited by defendants dictate a contrary conclusion. The O'Brien v. Sperry Univac case, supra, 458 F.Supp at 1179, is distinguishable in that plaintiffs there were asserting a claim under the summary plan description rather than under the pension plan itself. Additionally, in this case, here, defendants are not asserting that plaintiff's pension rights arose before the date ERISA was enacted. Cf. Cowan v. Keystone Employee Profit Sharing Fund, 586 F. 2d 888 (1st Cir. 1978). Thus, defendants' motion to dismiss for lack of jurisdiction under diversity of citizenship is granted, but is denied insofar jurisdiction is also invoked pursuant to ERISA. Since this Court has federal question jurisdiction over pension

claim, Count I, I believe that pendent jurisdiction over the non-federal claims in Counts II, III and IV is proper. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

B. FAILURE TO STATE A CLAIM

Alternatively, all defendants except Sea-Land move to dismiss the complaint for failure to state a claim upon which relief may be granted. To prevail on this motion, these defendants must show that it appears to a certainty that plaintiff is not entitled to relief under any state of facts which could be proved to support his claim. See Scott v. Plante, 532 F.2d 929, 945 (3d Cir. 1976). Plaintiff has alleged that defendant Sea-Land is owned and operated by defendant McLean Industries, which in turn is a subsidiary of defendant R.J. Reynolds, and that defendant Retirement Board operates the retirement plan for McLean's employees. These allegations must be accepted as true for purposes of this motion, and, accordingly, the corporate interrelationship among

these defendants renders each defendant potentially liable to plaintiff. Thus, this aspect of defendants' motion is denied.

C. SUMMARY JUDGEMENT

Defendants also move for summary judgment on all four counts of the complaint. As the moving party, defendants must show there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Adickes v. Kress Co., 398 U.S. 144, 157 (1970). All factual inferences must be resolved in favor of plaintiff. See Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978). Counts I and II, the ERISA and breach of contract claims, essentially allege that defendants have not paid plaintiff all the retirement benefits due him under the 1972 employment agreement. I believe there remains a factual dispute as to whether or not plaintiff's gross commissions

for the years 1962-67 should be included in determining plaintiff's pension rights. For instance, there appears to be two different versions of the McLean Plan before the Court, one of which defines "compensation" as including commissions, and one which does not. Determining which of these versions applies to plaintiff's case is a matter of proof. Also, there is a dispute as to whether defendants included commissions in the actual computation of pension benefits for its employees. Paul Richardson, former President of defendant Sea-Land, stated during deposition that commissions were considered in determining benefits under the McLean Plan. See Deposition of Richardson, filed January 23, 1979, at 46-47. This is in direct contrast to the position taken by Richardson's former employer in this lawsuit. These are but two instances of questions of fact as to Counts I and II.

Count III is a claim for fraud in the inducement, and Count IV seeks punitive damages for malicious misrepresentation. Both of these

counts necessarily involve proof of the parties' intent, a factual inquiry. Also, I believe the allegations in the complaint and the factual contentions spelled out in the Pretrial Order are sufficiently specific to meet the requirements of Fed.R.Civ.P. 9(b).

The motion for summary judgment is denied.

D. DISCOVERY OF PLAINTIFF'S INCOME TAX RETURNS

The final part of defendants' motion is a demand for the production of plaintiff's income tax returns for years 1964-71. As a general rule, federal income tax returns are subject to discovery in civil suits where a litigant tenders an issue as to the amount of his income. See Shaver v. Yacht Outward Bound, 71 F.R.D.561, 563-64 (N.D. Ill. 1976). Plaintiff has put his income for years 1964-71 in issue here, since in this lawsuit he is claiming that his retirement benefits should

be computed so as to include the commission he received during this time period. While defendant's payroll records probably contain such financial information, plaintiff has disputed the accuracy of their salary figures. See Hoehn Deposition at 45-54. Accordingly, plaintiff must submit copies of his 1964-71 federal income tax returns to defendants. However, only those portions of the returns which directly pertain to plaintiff's income must be disclosed. The other sections of the returns, dealing with deductions, indebtedness and the like, may be excised. Copies are to be produced within ten days.

III. CONCLUSION

In sum, defendants' motion to dismiss for lack of subject matter jurisdiction is granted, insofar as the complaint is based on diversity of citizenship, but is denied as to federal

question jurisdiction under ERISA. This Court has pendent jurisdiction over the non-federal claims. The motions to dismiss for failure to state a claim and for summary judgment are also denied. Defendants' request for the production of plantiff's tax returns is granted subject to the conditions set out above.

Counsel for plaintiff is to submit an appropriate order.

Very truly yours,

/s/ Clarkson S. Fisher

Clarkson S. Fisher
Chief Judge
United States District Court
District of New Jersey

CSF/ebj

UNITED STATES DISTRICT COURT
DISTRICT FOR NEW JERSEY

Hon. Clarkson S. Fisher,
Chief Judge

RUSSEL F. HOEHN,

Plaintiff

Docket No. 78-955

Civil Action

vs

ORDER

SEA-LAND SERVICE, CO.
INC., et als

Defendants.

ORIGINAL FILED
August 27, 1979
Angelo W. Locascio
Clerk

This matter being opened to the Court by Meyner and Landis, Attorneys for the Defendants (Jeffrey L. Reiner, Esq. appearing) in the presence of Joseph F. Rubacky, Jr., Attorney for the Plaintiff, on the motion of the defendants to dismiss the complaint for lack of subject matter jurisdiction; to dismiss the complaint against all parties save Sea-Land Service, Inc.; to compel the Plaintiff to provide discovery to Defendants as to Plaintiff's personal federal income tax returns for the years, 1964 through 1971; and for summary judg-

ment in favor of defendants on all counts of the complaint and upon defendants' Counterclaim, and the Court having considered the Affidavits and Brief submitted in support of and in opposition to the motion and having heard the arguments of counsel and for good cause shown

It is on this 27th day of August, 1979

ORDERED

1. that the Defendants' motion to dismiss the complaint for lack of subject matter jurisdiction be and the same is hereby denied;

2. that the Defendants' motion to dismiss the complaint for lack of complete diversity of citizenship between the parties be and the same is hereby granted;

3. that the Defendants' motion to dismiss for failure to state a claim be and the same is hereby denied;

4. that the Defendants' motion for the production of Plaintiff's federal income tax returns for the years, 1964 through 1971 is

hereby granted, however, a protective order is hereby entered granting the Plaintiff the right to disclose only those portions of the returns which directly pertain to Plaintiff's income and restricts the Defendants from reviewing other sections of the returns dealing with deductions, indebtedness and the like, and that such protected sections of the Plaintiff's income tax return may be excised and further, that copies of such income tax returns are to be produced and presented by the attorney for the plaintiff to the attorneys for the defendants within ten days of the within Order.

5. that the Defendants' motion for summary judgment be and the same is hereby denied.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER,
U.S.D.J.

Chief Judge

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
Clarkson S. Fisher
Chief Judge

August 13th, 1979

NOT FOR PUBLICATION

FILED
September 21, 1979
at 3:00 P.M.
Angelo W. Locascio
Clerk

Joseph F. Rubacky, Jr., Esquire
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(Attorney for Plaintiff)

Jeffrey L. Reiner, Esquire
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(Attorneys for Defendants)

RE: HOEHN v. SEA-LAND SERVICE, et al.;
Civil Action No. 78-955

Gentlemen:

Pursuant to General Rule 12I, the defendants Reynolds and McLean have moved for reargument and reconsideration of portions of this Court's opinion of August 13, 1979 in this matter. Although that decision addressed numerous contentions raised by the defendants, the instant application involves only the motion

of Reynolds and McLean to dismiss the complaint against them for failure to state a claim upon which relief can be granted. This letter opinion grants the motion for reargument and resolves the issues raised thereby.

I have examined the papers filed in support of this application and re-examined the original briefs submitted by the parties. Buried as it was in a myriad of other legal issues, this particular issue did not receive the consideration and explication it deserved. I will therefore address it in more detail at this time.

In their initial moving papers, McLean and Reynolds argued that the complaint failed to state a claim upon which relief could be granted against them because they were not alleged to have been involved with the defendant's Sea-Land's employment of Hoehn. Plaintiff's response to this was that under the basic law of agency, McLean and Reynolds were

responsible for the acts of Sea-Land, their subsidiary. As counsel will recall, for purposes of this motion, I must accept as true the allegations of paragraph three of the complaint that a parent-subsidiary relationship existed between these three corporations. E.g., McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1236 (3d Cir. 1978).

In support of the present motion, the moving defendants argue in greater detail that the doctrine of respondeat superior has nothing to do with this case. It is their contention that they may be held liable for the acts of Sea-Land only upon a theory of piercing the corporate veil, see Schmid v. First Camden Bank, 130 N.J. Eq. 254 (Ch. Div. 1941); Randolph Laboratories v. Specialties Development Corp., 62 F. Supp. 897 (D.N.J. 1945), and that no such theory has been alleged in this case. Moving defendants also dispute the plaintiff's contention that they are necessary parties to this action. Fed.R.Civ.P. 19.

I shall state briefly my conclusions on these issues. First, agency principles have no application in this case. The complaint alleges that a master-servant nor a principal and agent relationship existed between Sea-Land and the moving defendants. It alleges only the existence of a parent-subsidiary relationship. McLean and Reynolds,

as only stockholders of Sea-Land, are not responsible for the latter's actions on the grounds of respondeat superior. The complaint against these defendants can be sustained, therefore only if it can be read to allege that the corporate form of Sea-Land should be ignored.

It is my belief that it does. In my view, allegations of interlocking corporate control, especially of domination, coupled with allegations that the defendants are jointly responsible for some act or omission, is sufficient to fairly present the issue of piercing the

corporate veil for consideration. Fed.R.Civ. P. 8. Plaintiff need not expressly allege every legal theory upon which his claim for relief is based. See 5 Wright & Miller, Federal Practice and Procedure, § 1219. Whether these allegations would survive a motion for summary judgment, Fed.R.Civ.P. 56, and whether they would be sustained after trial is yet to be seen, but at this time the allegations alone will overcome the interposition of a defense of failure to state a claim.

Because of my resolution of the above issues, I express no opinion on plaintiff's allegations that the moving defendants are necessary parties to this action.

Accordingly, the defendants' motion for reargument is granted, but the Court reaffirms its prior decision and the motion to dismiss is denied. Counsel for McLean and Reynolds shall submit an appropriate order.

Very truly yours,
/s/ Clarkson S. Fisher
Clarkson S. Fisher
Chief Judge
United States District Court

CSF/ebj

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 78-955

RUSSEL F. HOEHN,)
Plaintiff) (OPINION) Transcript of Proceedings
vs)
SEA-LAND SERVICE, INC., et al.) Trenton, New Jersey
Defendants.) January 5, 1981

B E F O R E:

THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

A p p e a r a n c e s:

JOSEPH F. RUBACKY, JR., ESQ.
For the Plaintiff.

MESSRS. MEYNER & LANDIS
By: JEFFREY L. REINER, ESQ.
-and-
RICHARD L. SCHAPLOWSKY, ESQ.
For the Defendants.

VINCENT RUSSONIELLO, C.S.R.

Official Court Reporter-
United States District Court

409 E. State St. (609) 989-2120
Trenton, N.J. 08605 (609) 695-0535

THE COURT: This case is based on plaintiff's claim that defendant Sea-Land Service, Inc., hereinafter "Sea-Land", his former employer, improperly computed his retirement benefits and that they have failed to provide him with a copy of the revised pension plan. The complaint also sets forth claims based on allegations that the defendants have breached a sales agency with plaintiff and have engaged in fraud and malicious misrepresentation by the manner in which they purchased a freight-forwarding business from plaintiff in 1972.

Most of the matters before the Court today involve applications for judgment under Rule 56, Federal Rules of Civil Procedure. Under Rule 56, summary judgment may be granted only if the moving party demonstrates that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. Small v. Seldows Stationery, 617 F. 2d 992, 994 (3rd Cir. 1980).

In responding to a motion for summary judgment, a party may rest on his pleading only

so long as the moving party has not demonstrated the absence of a genuine issue of material fact. Although all inferences to be drawn from any evidentiary material submitted will be drawn in favor of the party in opposition, when the moving party has met his burden, the opposing party must come forward with his own material to demonstrate the existence of a conflict.

DeLong Corporation v. Raymond International, Inc., 622 F. 2d 1135, 1142 (3rd Circ. 1980).

The first motion is defendants' motion for summary judgment in favor of defendant R. J. Reynolds Industries, Inc. hereinafter "Reynolds", on all counts of the Amended Complaint and for summary judgment in favor of Reynolds on defendants' counterclaim.

Reynolds is a part of this lawsuit on the basis of plaintiff's allegation that,

"Sea-Land is owned, operated and dominated as a subsidiary or affiliate corporation of Mc Lean Industries, Inc" . . . . Defendant,

R. J. Reynolds Industries, Inc., owns McLean as a subsidiary or affiliate corporation. (Paragraph 3, Amended Complaint.)

In his letter opinion of September 21, 1979, Judge Fisher ruled as follows:

"Agency principles have no application in this case. The complaint alleges neither that a master-servant nor a principal and agent relationship existed between Sea-Land and Reynolds. It alleges only the existence of a parent-subsidiary relationship. McLean and Reynolds, as only stockholders of Sea-Land, are not responsible for the latter's action on the grounds of respondeat superior. The complaint against these defendants can be sustained therefore only if it can be read to allege that the corporate form of Sea-Land

should be ignored."

This issue of the relationship between Reynolds and Sea-Land now comes before the

Court again, this time on a motion for summary judgment under Rule 56. Judge Fisher's ruling, which we are persuaded there exists no good cause to overturn, means that Defendant Reynolds may be held liable in this lawsuit only to the extent that the grounds exist to pierce the corporate veil between Sea-Land and Reynolds. For purposes of the motion to dismiss decided by Judge Fisher, plaintiff merely had to allege facts sufficient to justify disregarding the corporate forms. For purposes of the motion before us plaintiff, responding to a motion for summary judgment, must come forward to show that there exists a genuine issue as to a fact which is material to a determination whether or not to pierce the corporate veil.

Thus, the proper question becomes: What facts has plaintiff brought forward in support of his contention that the parent corporation, Reynolds, should be held liable for the acts of its subsidiary, Sea-Land? In his "Memorandum in Opposition", plaintiff has listed the

following allegations which he feels justifies the piercing of the corporate veil: Interlocking boards of directors; representation by the same attorneys; necessity of a corporate resolution by Reynolds in order for Sea-Land to enter a guilty plea in a

criminal action; and the fact that "the Defendant Reynolds controls all reports made to the various government agencies involved" (in overseeing pension plans.) (Pages 6 and 7 of "Memorandum in Opposition"). In his trial brief, plaintiff adds the following allegations: All profits and losses from Sea-Land go to the benefit of Reynolds; the Defendant Retirement Board is a division of Reynolds; Reynolds World Headquarters is at Winston-Salem, North Carolina; Sea-Land's activities are described in Reynolds' annual and quarterly reports; Sea-Land's Chairman Hiltzheimer is quoted in an article as saying that he is responsible to the shareholders of Reynolds. (Pages 18 to 20 of trial brief.)

Accepting solely for the purpose of this motion that all of the above alleged facts are true,we being with this principle: A corporation is an independent entity, separate and distinct from its officers and shareholders. The corporation's debts and acts are not the debts or acts of its shareholders. DeWitt Truck Brokers v. W. Ray Fleming Fruit Co., 550 F. 2d 681, 683 (4th Cir. 1976). See generally, Zubik v. Zubik, 384 F. 2d 267, 273 (3rd Cir. 1967), cert. denied, 390 U.S. 988 (1968). Indeed, the desire to limit one's personal liability is the traditional reason for forming a corporation, Zubik v. Zubik, supra at 273, and this purpose does not defeat the corporate form. Anderson v. Abbott, 321 U.S. 349, 361 (1944). Likewise, a subsidiary corporation is an

entity independent of its parent, and absent proof of fraud or injustice in the use of the relationship, a court will not treat the two corporations as one. Chengelis vs. Cenco In-

struments Corp., 386 F. Supp. 862, 865 (W.D. Pa.) aff'd without opinion, 523 F. 2d 1050 (3rd Cir. 1975).

The Courts decline to recognize the corporate form, however, whenever such recognition would extend the principle of incorporation beyond its legitimate purposes and produce injustices or inequitable consequences. Accordingly, "'in an appropriate case and in furtherance of the ends of justice,' the corporate veil will be pierced and the corporation and its stockholders treated as identical.'" DeWitt Truck Brokers v. W. Ray Fleming Fruit Co., supra at 683.

Piercing the corporate veil is appropriate when there is such a melding of identity between parent and subsidiary that they can be treated as one and the same, when failure to pierce the corporate veil will result in the avoidance of a clear legislative purpose, or when the corporation is used as a vehicle to defeat the public convenience. Zubik v. Zubik, supra. Factors courts have considered

in determining whether to pierce the corporate veil include whether the corporation was grossly undercapitalized, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation, siphoning of

corporate funds by the dominant stockholder, nonfunctioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder. Publicker Industries, Inc. v. Roman Ceramics Corporation, 603 F. 2d 1065 (3rd Cir. 1979).

Plaintiff has never asserted, in support of the piercing of the corporate veil between the parent Reynolds and the subsidiary Sea-Land an allegation that the parent/subsidiary form worked to plaintiff's detriment. There is no proof at the time that Sea-Land executed any agreements with plaintiff, plaintiff concealed its relationship with Reynolds, or used that relationship to defraud or to de-

ceive the plaintiff. Plaintiff dealt with the subsidiary Sea-Land at all times, and Defendant Reynolds was never a party to any dealings with the Plaintiff.

We do not believe that plaintiff has demonstrated the existence of a genuine issue of fact material to a determination of the liability of the Defendant Reynolds for the acts of its subsidiary. Taking an overall view, we see no proof of any of the acts which other courts have relied upon in deciding to ignore the parent/subsidiary form. In the context of the agreements which lie at the heart of this lawsuit, plaintiff has not shown that he was in any way injured specifically by the parent/subsidiary relationship.

Therefore, defendants' motion for summary judgment as to Defendant Reynolds on all counts of the Amended Complaint will be granted.

As to Defendant Reynolds' motion for summary judgment on the defendants' counterclaim, we believe that it is proper for the Court to

reserve ruling on this motion until after the outcome of the case in chief. The counterclaim is a claim for attorneys' fees under 28 USC Section 1132(g). Since the statute allows the Court to exercise its discretion to award fees to either plaintiff or defendant, and since the counterclaim is addressed to plaintiff on the part of all defendants, we feel that the plaintiff's claim against all defendants should be adjudicated before we can properly exercise our discretion as to defendants' counterclaim.

Accordingly, we will reserve judgment as to Reynolds'motion for summary judgment on the counterclaim.

Defendants have also moved for the dismissal of Counts 5 and 6 of the Amended Complaint, but both sides have addressed themselves in their papers only to the question of whether the New Jersey Franchise Practices Act, NJSA Section 56:10-1 et seq. applies to this case. We agree with the defendants that this Act has no application to this matter. The two

agreements sued upon here are not franchise agreements. They are a "Sales Agency Agreement" and a "Termination Agreement." The content and effect of these contracts only

bears out, and does not bely, these titles.

In Finlay & Associates, Inc. v. Borg-Warner, 146 N.J. Super. 210 (1976), aff'd, 155 N.J. Super. 331 (1978), the New Jersey Superior Court considered a distributorship agreement in the context of the Franchise Practices Act, and concluded that the statute did not apply.

Here, as in Borg-Warner, "there is no written agreement granting a 'license' to plaintiff from defendant to 'use' anything. Id., at 217. Defendants point out that Paragraph 23 of the 1964 Sales Agency Agreement provided that neither Mr. Hoehn nor his business acquired "any rights, title or interest to or under any good will trade name, copyright or any other right or property of Sea-Land." The heart of a franchise agreement,

it seems to us, is the licensing of one party to conduct a business using in part the property, name, slogan or unique machinery of another. There is no such arrangement in the present case.

That is not the end of the matter. Defendants have styled their motion as one for an "order dismissing Counts 5 and 6 of the Amended Complaint filed herein." Defendants assert in their brief that these counts should be dismissed for failure to state a claim. Normally, such a motion would be brought under Federal Rules of Civil Practice 12(b)(6). However, since the defendants have filed an answer to the

Amended Complaint, the motion must stand in fact as a motion for judgment on the pleadings, as provided in Rule 12(c). We have so dealt with this motion. Since our decision is based on a review of the entire file in the matter, and has included material outside the pleadings, Rule 12(c) directs us to treat defend-

ants' motion as one for summary judgment, applying all the standards of Rule 56.

Defendants, therefore, have in effect asked for summary judgment on Counts 5 and 6 of the Amended Complaint. In order for this Court to grant summary judgment, we must be convinced that there exists no genuine issue as to any fact material to a determination of liability under these counts. Count 5 alleges a breach of the 1972 Termination Agreement amounting to a failure of consideration, and demands an award of a certain percentage of all shipping revenues of the defendant for a period of time, claiming that the defendants were unjustly enriched by their breach of contract to this extent. Count 6 alleges actual malice on the part of the defendants, and demands punitive damages.

Count 5 revolves around the understanding and intent of the parties signatory to the 1972 Termination Agreement. Count 5 incorporates Paragraphs 1 through 16 of the

Amended Complaint. Paragraphs, 8, 9 and 10 of the Amended Complaint speak at a number of points about the "intention" of the parties; and their "understandings."

Construing, as we must, all inferences in favor of the party opposing the motion for summary judgment, we believe that plaintiff has demonstrated that there exists a genuine issue of fact relative to the intent and understanding of the parties to the Termination Agreement.

Questions of motivation and intent are rarely appropriate for resolution on a motion for summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Mazalewski v. Truesdale, 562 F. 2d 701 (D.C. Cir. 1977). Particularly so when, as here, the motive and intent involved concern a contract open to conflicting interpretation. Drexel v. Union Prescription Centers, Inc., 582 F. 2d 781 (3rd Cir. 1978); Thompson-Starrett International, Inc. v. Tropic Plumbing, Inc., 457 F. 2d 1349 (3rd Cir. 1972).

Additionally, Count 5 of the Amended Complaint adds a specialized claim beyond the usual breach of contract claim. Plaintiff alleges in Count 5 that defendants' breach of contract amounted to a "failure of consideration."

"Failure of consideration exists wherever one who has promised to give some performance fails, without his fault, to receive in some material respect the agreed exchange for that performance. Where the counterpromise to perform relates to a material matter, the disappointed party has the right to rescind the contract."

Guimmarra v. Harrington Heights, 33 N.J. Super, 178, 190 (1954). Since "Courts commonly determine whether promises are dependent on one another by seeking out the intent of the parties," Id., at 191, the motive and understanding of the parties to the Termination Agreement are even more at issue in Count 5.

Furthermore, the Marinello cases, which

both sides have discussed at length in connection with the argument that the N.J. Franchise Practices Act applies to this case, establish the N.J. Public Policy that a duty of good faith and fair dealing is attendant upon all New Jersey contracts. To the extent that plaintiff claims a violation of this duty, summary judgment on this issue, involving intent and motive, is even furthermore not appropriate. Accordingly, summary judgment on Count 5 of the Amended Complaint will not be entered in favor of the defendants.

Count 6, the prayer for punitive damages, must be considered. The complaint alleges defendants breached their agreement with plaintiff with actual malice for the purpose of defrauding plaintiff. It is important to note that in Paragraph 25, Count 6 incorporates Paragraphs 1 through 16 and 23 through 24. These paragraphs also state claims based on breach of contract. Since Count 6 asks for punitive damages based on the facts breached and incorporated, the question for our consid-

eration on this motion for summary

judgment is, may plaintiff be awarded punitive damages for breach of contract? Since we hold that as a matter of law, punitive damages may not be awarded for breach of contract, we grant defendants' motion for summary judgment as to Count 6 of the Amended Complaint.

The law of punitive damages in New Jersey was set forth by the Court in Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N. J. Super. 437, 448 (1976):

"In the absence of exceptional circumstances dictated by the nature of the relationship between the parties or the duty imposed upon the wrongdoer, the concept of punitive damages has not been permitted in litigation involving breach of a commercial contract. . . Where the essence of a cause of action is limited to a breach of such a contract, punitive damages are not appropriate regardless of the conduct constituting the breach."

This is not to suggest that the avail-

ability of punitive damages turns solely on the nature of the cause of action asserted. There are exceptions to the rule stated in the Sandler case.

"But these exceptions arise out of instances where there is more than just a breach of contract. That is, there must be a breach of trust."

First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association, 455 F. Supp.

464, 471 (D.N.J. 1978). The cause of action set forth in Count 6 of the Amended Complaint fits no exception to the Sandler rule: At most, it sets forth a claim based on the breach of a standard commercial contract. The parties stood in no sort of relationship which would impose on the defendants any special fiduciary or trust duty.

Accordingly, since plaintiff is not entitled to punitive damages as claimed in Count 6, summary judgment in favor of all defendants

shall be entered as to the Sixth Count of the Amended Complaint.

Now, in addition pending before me are some evidentiary questions specifically having to do with the entry of the guilty plea by Sea-Land before Judge Meanor in the proceeding which has been referred to quite frequently this morning.

I have reviewed the rules which have been cited by the parties and I have determined that even though technically we're not in trial and we're still in the pretrial stage and theoretically, I suppose, this ruling should be made within the context of the trial itself, based on the arguments presented by counsel, I would find the use of that conviction inadmissible for purposes of this trial.

There is a question as to its relevance. But even if relevant I would deem it to be inadmissible under Rule 403 inasmuch as the admissibility of that evidence as I

see it would contribute more to confusion than

to advancing any issues to be proved in this case.

Anything further pending before me?

MR. REINER: I believe the motion to quash the subpoena in light of Reynolds is no longer a party to the action and the evidentiary question has been decided in Sea-Land's favor --

THE COURT: Would you submit an appropriate order pursuant to this opinion, Mr. Reiner?

MR. REINER: Yes.

MR. RUBACKY: I have to oppose that conclusion Mr. Reiner just reached. It falls on its own weight. I don't agree with that at all. Under the circumstances --

THE COURT: You mean the subpoena is still viable?

MR. RUBACKY: My contention is it should have been complied with and the reason for that is this:

You're making an evidentiary ruling which would apply at the time of trial without hav-

ing the evidence before you. The next step in this is going to be if you couldn't put the plea of guilty in, you can't put anything else in which indicates we committed frauds of crime.

I don't buy that. I think that's one of the reasons why this subpoena got to be enforced. It should have been enforced. At best this order with respect to the evidence

at this point should be confined strictly to those items which we discussed and which we agreed identified as part of the record of this motion.

I don't want to be circumscribed at the time of trial issuing a subpoena to him and he comes and says that was quashed.

THE COURT: Gentlemen, it's now 12:25. We have another case with a motion filed. I'm going to give you a little recess and we're going to move on to the next case and you may come back before me to discuss just the subpoena and what effect my ruling today has on

the motion to quash that subpoena.

MR. RUBACKY: Thank you, your Honor.

MR. REINER: That will be on a subsequent date?

THE COURT: No, this afternoon -- wait a minute. If you want to take 20 minutes you can come back then.

(Approximately 20 minutes later the following takes place.)

MR. REINER: Your Honor, both sides would be amenable to your Honor granting defendant's motion to quash the subpoena without prejudice, however, to Mr. Rubacky's right to have a new subpoena issued in conformity with today's pending action.

MR. RUBACKY: I don't believe that's exactly

the way it is. I stated to Mr. Reiner I wasn't going to oppose the motion to quash provided it didn't limit me in preparing another subpoena even if I use the exact same subpoena for the purposes of the trial.

At this time the trial is set. In other words, it would be quashed without prejudice for me to filing another motion duces tecum.

MR. REINER: I would have no objection to that but, your Honor --

THE COURT: I don't know if I understand what you're saying. I assume plaintiff wants to know about criminal convictions, pleas of guilty and so on in Sea-Land.

MR. REINER: Yes, ma'am.

THE COURT: So far as I'm concerned, they are entitled to know about it.

Now, I have my opinion with regard to the admissibility at trial. I said it. Obviously, it's kind of premature right now because we're not at trial. But you're certainly going to have to show something other than what's been shown thus far.

You've got to prove intent was the only viable, it seems to me, for their admissibility and I don't believe it appropriate to show intent. So for many reasons, I don't see that appropriate to show intent.

Now, there may be some other guilty plea that

may be admissible.

MR. REINER: There are none, but he certainly has a right to inquire.

THE COURT: So far as that's concerned, I think you have an obligation to provide it.

MR. RUBACKY: Under the circumstances -- just to make sure I'm not waiving any of my client's rights. My position has been you have a right to -- we weren't heard on this, but I better just say it to get it on the record.

You have a right to approve a routine practice of an organization --

THE COURT: That's right and one criminal conviction is not routine practice.

MR. RUBACKY: Not at all. My subpoena --

THE COURT: In fact, you don't even have a criminal conviction that I see would be probative of the particular complaint you've got

in this case.

MR. RUBACKY: I understand your opinion. I'm just saying that's the reason I want to be able to come back.

THE COURT: You can come back with anything consistent with what I just said.

MR. RUBACKY: I understand your judgment and opinion about the United States vs. Sea-Land conviction in this court by Judge Meanor. I didn't want the comments of

Mr. Reiner to put a limitation on what I can subpoena at a later date by waiving an order at me saying you can't do that.

THE COURT: I understand what you're saying and I agree with you.

MR. RUBACKY: I'll revise this.

THE COURT: Okay. Fine.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT FOR NEW JERSEY

RUSSEL F. HOEHN,	:	HON. ANNE E. THOMPSON
Plaintiff,	:	Civil Action No. 78-955
vs	:	ORDER
	:	FILED February 13, 1981 at 10:00 A.M.
SEA-LAND SERVICE, INC., et als	:	ANGELO W. LOCASCIO Clerk
Defendants.	:	

This matter being opened to the Court by Meyner and Landis, Attorneys for the defendants, on January 5, 1981, in the presence of Joseph F. Rubacky, Jr., attorney for the plaintiff, and the Court having reviewed the briefs, affidavits, pleadings and other documents on file in this matter, and having heard the oral argument of counsel, and for good cause shown, it is on this 15th day of February, 1981

ORDERED as follows:

1. Defendants'n motion for summary judgment dismissing defendant R. J. Reynolds Industries, Inc. on all counts of the Amended

Complaint is granted;

2. Defendants' motion for summary judgment on the Counterclaim of defendant R. J. Reynolds Industries, Inc. is reserved for decision until after trial;

3. Defendants' motion to dismiss Count V of the Amended Complaint, or in the alternative, for summary judgment in favor of all defendants of Count V of the Amended Complaint, is denied;

4. Defendants' motion to dismiss Count VI of the Amended Complaint is treated as a motion for summary judgment and the same be and hereby is granted; and it is

FURTHER ORDERED, that evidence of a prior plea of guilty on behalf of defendant, Sea-Land Service, Inc., Criminal No. 78-103, which plea was entered on April 11, 1978 before the Honorable H. Curtis Meanor, United States District Judge of the District of New Jersey, and a corporate resolution of R. J. Reynolds Industries, Inc. authorizing the taking of the aforesaid plea of guilty, and the

transcript of the hearing before the Honorable H. Curtis Meanor in United States v. Sea-Land Service, Inc. on

April 11, 1978, shall not be admissible for any purpose at the trial of the above captioned matter; unless for good cause shown; and it is

FURTHER ORDERED, that the subpoena of plaintiff herein issued to and served upon defendant Sea-Land Service, Inc. on November 19, 1980 is hereby quashed, without prejudice to plaintiff to issue and serve another subpoena upon the said defendant in accordance with the terms of the oral opinion of this Court rendered on January 5, 1981.

/s/ Anne E. Thompson
ANN E. THOMPSON
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 78-955

RUSSEL F. HOEHN,	)	Transcript of Proceedings
Plaintiff,	)	
vs	)	
SEA-LAND SERVICE, INC. et als,	)	Newark, New Jersey
Defendants.	)	March 2, 1981

B E F O R E:

THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

A p p e a r a n c e s:

JOSEPH F. RUBACKY, JR., ESQ.
and
JOHN H. TOVEY, ESQ.
Attorneys for the Plaintiff

MEYNER & LANDIS
BY: JEFFREY L. REINER, ESQ.
and
RICHARD L. SCHAPLOWSKY, ESQ.
Attorneys for Defendants

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

/s/ Jacqueline Augusto
JACQUELINE AUGUSTO

JACQUELINE AUGUSTO, C.S.R.
Official Court Reporter-
United States District Court

P.O.Box 397 (201) 643-5720
Newark, N.J. 07101 (609) 645-2260

MR. RUBACKY: Joseph F. Rubacky, Jr.

MR. TOVEY: John H. Tovey.

MR. REINER: Jeffrey Reiner. Along with me is Richard Schaplowsky from the same firm.

THE COURT: All right. Thank you.

All right. Here again we have a motion for reargument and the Local Rules specifically state that no oral argument shall be permitted on this type of motion, so, we won't require any oral argument on that.

In the motion for reargument the plaintiff has argued in his memorandum that several of the specific points raised in the motion decided on January 5th of this year should be considered. However, after a careful consideration of the papers which counsel have submitted, both in support of and in opposition to the instant motion for reargument, we are not convinced that any significant or controlling matters were overlooked by the Court in its ruling of January 5th. Accordingly, plaintiff's motion for

reargument is denied.

Now, with regard to the motion to strike the jury demand, is there any point that either party feels must be brought to my attention beyond that which you've already submitted on that?

MR. REINER: Not on behalf of defendants, your Honor.

MR. RUBACKY: No, your Honor.

THE COURT: Under Dairy Queen, Inc. vs. Wood, when a plaintiff has presented a claim such as the present one, where legal issues and remedies are mingled with equitable issues and remedies, he is entitled to a trial by jury only on the legal questions. Those matters properly labeled "equitable" carry with them no right to a jury trial.

We agree with defendants that plaintiff is not entitled to a jury trial on Count One of the Amended Complaint. This is the count that Judge Fisher called "the pension claim."

It is the claim based on an alleged violation of ERISA and it is the basis for this Court's jurisdiction over this case. Under Calamia v. Spivey and Wardle v. Central States Southeast and West Areas Pension Fund, it has become clear that suits under ERISA's Section 502(a)(1)(b) such as Mr. Hoehn's are essentially equitable and that trial to the Court comports with discernable Congressional intent.

It remains for us to consider the character of the other counts in plaintiff's complaint, in order to determine if he is entitled to a trial by jury on any of these matters. Count Five of the Amended Complaint is a prayer for recission and restitution, both of which are traditional equitable remedies. As such, Count Five does not carry with it a right to trial by jury. Count Three of the Amended Complaint

seems to set forth a claim grounded in fraud.

Hoehn's complaint, which contains several requests to be made whole via traditionally equitable remedies, appears to be just such a complaint wherein the claim of fraud carries with it no right to a jury trial.

Similarly, Count Four of the Amended Complaint simply sets out the same claim of fraud alleged in Count Three, and adds the allegation that the fraud was perpetrated with malice and purpose. This count adds nothing to plaintiff's jury trial rights.

Only Count Two of the Amended Complaint can be read as alleging a violation of a right which carries with it the entitlement to a jury trial. Count Two appears to be an allegation of the defendants' breach of the 1972 Re-Employment Agreement. It will be plaintiff's burden at trial to prove not only the breach of contract which he alleges but, also, the amount of damages prayed for. Since Count Two does allege a breach of contract, however, plaintiff has the right to attempt to

make these showings to a jury.

Accordingly, defendants' motion to strike plaintiff's jury demand is granted with respect to Counts One, Three, Four and Five of the Amended Complaint. Count Two of the Amended Complaint will be tried to a jury.

Now, with regard to the motion for summary judgment on Count Four, the defendants have asked for summary

judgment on Count Four of the Amended Complaint on the ground that it sets forth a claim for punitive damages for breach of contract, which damages are not awardable under New Jersey law.

Bearing in mind that all ambiguities are to be resolved in favor of the party opposing a motion for summary judgment, we believe that Count Four may be read as setting forth a prayer for punitive damages not for breach of contract but, rather, for fraud and misrepresentation. In Paragraph 20, Count Four incor-

porates by reference Paragraphs 18 and 19 of Count Three, which appear to allege that plaintiff was defrauded. On January 5, we dismissed Count Six as an improper prayer for punitive damages based on breach of contract. Defendants' attempt to extend our reasoning on that Count to Count Four, which contains at least a colorable allegation of fraud, cannot prevail.

Accordingly, defendants' motion for summary judgment on Count Four of the Amended Complaint is denied.

Motions for declaratory judgment and amendment of Pre-Trial Order made by defendants. There was a request seeking either, a declaratory judgment that if plaintiff prevails on Count Five, the damages which he may collect are limited to $20,000; or, in the alternative, defendants ask that the Court amend the Pre-Trial Order to permit them to present the testimony of an expert witness.

First, we note that the declaratory judgment sought by the defendants pursuant to 28 U.S.C., Section 2201 is not available to them. This statute is not to be used by the parties to a suit to obtain interim rulings on matters central to the dispute.

In the case at bar, the proper place for the defendants to assert and to prove their case about the limitation on plaintiff's damages under Count Five is within the context of the trial. It is not a proper use of the Declaratory Judgment Act to employ it as a means for the "vindication of a claim for damages which is still before this Court."

Accordingly, defendants' motion for declaratory judgment will be denied.

As to defendants' alternative request for the amendment of the Pre-Trial Order, we are not convinced that this is the proper course, given the basis for the defendants' request. As we understand it, defendants

consented to the Final Pre-Trial Order, which did not include the presentation of expert witness testimony on their behalf. Now, on the basis of some apparently unilateral attempts on the part of the plaintiff to vary the amount and content of expert testimony which he plans to present at trial, defendants feel that they will be prejudiced if they are not permitted to present their own expert testimony.

It seems to us that neither party should be allowed to stray from the agreement set forth in the Pre-Trial Order. If plaintiff plans to attempt to present testimony of an expert which does not comport with what he represented in the Pre-Trial Order would be the content of that testimony, it will be entirely proper for me to rule upon such testimony at trial. It appears that the defendants are attempting to obtain a ruling from this Court based solely upon their fears of

what might transpire at trial. Such a ruling would be premature at this time.

Therefore, defendants' motion for leave to amend the Pre-Trial Order is denied.

The Court will enter an order which comports with this opinion.

MR. REINER: May I speak very briefly?

THE COURT: Yes, sir.

MR. REINER: With respect to the last ruling only, if I might just be heard momentarily. At the time of the initial Pre-Trial Order there was no Count Five or Count Six in the case and today, following the Pre-Trial Order there is a -- Count Five still remains, no longer Count Six in the case.

If I understand your Honor's ruling, defendants cannot, will not be given the right to amend the Pre-Trial Order to retain an expert.

I, also, understand your Honor's ruling that

plaintiff's expert cannot testify with respect to proofs under Count Five. Is that correct, Judge? If that's not correct, I would think it's not an equitable result, inasmuch as the Pre-Trial Order was entered prior to the time in Count --

THE COURT: I see what you're saying. What were your plans, sir?

MR. RUBACKY: My plans, your Honor, were simply this: We are not in the possession of sufficient information in order to be able to reach a valuation. That is in the hands of the defendants. They have not seen fit to turn it over to us.

Now, under the circumstances, we were denied further discovery on the amendment of the Complaint. The defendants were afforded sixty days of discovery.

Based on that, I would say that we intend to subpoena information from them, put it into the record in evidence and from that

we would have an expert sit on the stand and do the calculation in front of the Court and the jury; however, the situation being that we were limited to those means of proof.

Now, if we had had discovery we would have afforded an expert an opportunity to review these facts and, then, give us an opinion and we would have produced the opinion for our adversaries to review.

THE COURT: You still feel that you need an expert?

MR. REINER: Absolutely, Judge, if we're going to testify it's a valuation of a business.

I might point out, Mr. Rubacky, in his affidavit, when he saw leave to amend the Complaint to add Count Five and Count Six, said in no uncertain terms twice in both the original and reply affidavit that the new Count Five and Count Six does not raise any new issues of fact or require additional discovery.

MR. RUBACKY: I did -- I said that -- I said we were not afforded any additional discovery.

MR. REINER: No additional discovery is needed is what he said, Judge, in paragraph 5 of the reply brief.

MR. RUBACKY: My plan that I outlined to you, your Honor, was the plan I had in mind at the time.

THE COURT: All right. I'm going to reverse myself. I'm going to permit you to do so.

MR. RUBACKY: Pardon me, your Honor?

THE COURT: I'm going to reverse myself with regard to the expert and permit them to do so.

MR. RUBACKY: Under the circumstances, then, I think it should be appropriate and fair that (1), that there be terms set, terms that do not delay this case for trial based on discovery.

THE COURT: Yes, that's right.

MR. RUBACKY: Beyond that, I think I should be entitled to the same information he passes on to his expert so that my expert can review that and prepare a report, also.

THE COURT: The normal procedure with regard to the exchange of reports will apply.

MR. RUBACKY: I didn't say that, your Honor. I said I should be entitled to the information. I don't have it. I should be granted that information immediately so that I can present it to my expert.

THE COURT: Well, let's see first what kind of report the expert comes up with. That's what you're entitled to.

MR. RUBACKY: If I may make a point, your Honor, I can't draw a report unless I have facts and I don't have the facts. Mr. Reiner's clients have the facts. They're exclusively in their jurisdiction.

THE COURT: I don't see it that way at

all.

MR. RUBACKY: Well, I don't know what the value of the business is out of the air, your Honor. We're talking about utilizing certain numbers or income figures or whatever you want to call it. I don't have that information. I never had it.

THE COURT: Sir, I don't agree with you. I will enter an order pursuant to what I have said just now with

regard to the motions that are presently before me and if there's anything further to be filed, I'll consider it at that time.

MR. REINER: Thank you, your Honor.

MR. RUBACKY: Are you going to put a time limit on this, your Honor? We just discussed that. We did have trial date before.

THE COURT: Well, it's obvious you're going to have to move very quickly.

Do we have a trial date set for March

--

MR. REINER: There's no trial date presently set, your Honor.

THE COURT: I would certainly hope that you would have everything completed with the report within thirty days.

MR. REINER: Yes, your Honor.

THE COURT: All right.

MR. RUBACKY: How much time will I have at that point, your Honor?

THE COURT: It's going to be exchanging of the reports. If that can be done within thirty days, then, we'll see if there's anything further. It well may be that nothing further needs to be done.

MR. RUBACKY: I hate to sound obtuse but you're proposing something to me that I can't deliver.

THE COURT: Wait till you get a copy of my order

and write to me and let me know why you can't deliver. I'm not going to delay any

further now, sir.

MR. REINER: Thank you.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT FOR NEW JERSEY

RUSSEL F. HOEHN,	:	Civil No. 78-955
Plaintiff,	:	
vs	:	ORDER
SEA-LAND SERVICE, INC. McLEAN IUNDUSTRIES, INC. R.J. REYNOLDS INDUSTRIES, INC., and THE RETIREMENT BOARD, Mc LEAN INDUSTRIES, INC.,	:	
Defendants.	:	ORIGINAL FILED March 3, 1981 Angelo W. Locascio Clerk

This matter having been brought before the Court on motion of plaintiff by Joseph F. Rubacky, Jr., Esquire for reargument of the motions originally decided by the Court on January 5, 1981, and on motions by the defendants by Meyner and Landis, Jeffrey L. Reiner, Esquire, appearing, for an order striking plaintiff's jury demand, for an order granting summary judgment to defendants on Count Four of the amended complaint and for an order granting defendants leave to amend the pre-trial order in this matter to allow

defendants to present the testimony of an expert witness, or, in the alternative, for a declaratory judgment of this Court pursuant to 28 U.S.C. §2201 that plaintiff may not recover damages in excess of $20,000 on Count Five of the amended complaint; and the Court having read and considered the briefs submitted and the oral arguments of counsel; it is on this 4th day of March, 1981,

ORDERED that the defendant's motion to strike the plaintiff's jury demand is granted as to Counts One, Three, Four and Five of the amended complaint and denied as to Count Two of the amended complaint; and it is further

ORDERED that the defendants' motion for summary judgment on Count Four of the amended complaint is denied; and it is further

ORDERED that the defendants' motion for a declaratory judgment pursuant to 28 U.S.C. §2201 is denied; and it is further

ORDERED that the defendants' motion for leave to amend the pre-trial order to permit

them to obtain an expert witness is granted.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

UNITED STATES DISTRICT COURT
District of New Jersey
Trenton, N. J. 08605

Chambers of
Anne E. Thompson
Judge

May 21, 1979

NOT FOR PUBLICATION

ORIGINAL FILED
May 22, 1981
at 12:15 P.M.
Angelo W. Locascio
Clerk

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OPINION

RE: HOEHN v. SEA-LAND SERVICE, et al.;
Civil Action No. 78-955

Dear Counsel:

This letter opinion resolves plaintiff's motion for the "resettlement" of orders entered by this Court on February 13 and March 3, 1981. In addition, this letter opinion addresses and resolves the issues raised by the defendants'

motion for consideration of a portion of our order entered March 4, 1981. 1/ I have decided the motions on the basis of the papers submitted, pursuant to Fed. R. Civ. P. 78.

I. Plaintiff's Motion for "Resettlement"

Plaintiff has filed the instant motion for what is called "resettlement" of the Court's orders of February 13 and March 4, 1981. As stated in plaintiff's notice of motion, the motion is

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1. On March 4, 1981, I signed an order embodying the oral opinion read into the record on March 2, 1981. The order was stamped "Filed" by the Clerk's office with the date March 3, 1981. Although the parties have referred to this order by both dates, it is the date of signing by the Court which properly denominates the order, and we shall so refer to it henceforth.

made "pursuant to Fed. R. Civ. P. 60, or such other rules as may be applicable." Rule 60, however, deals with relief from an order of the Court due to such things as clerical error, mistake, inadvertence, fraud and so forth. Nowhere does Rule 60 speak of "resettlement."

It appears that what plaintiff is in fact seeking by means of the instant motion is the certification by this Court of the February and March orders as "final judgments," under Rule 54(b). Initially, we note that plaintiff has misconceived his burden under this rule. Plaintiff's moving papers state that the motion for "resettlement" is based on the fact that "the said Orders are not in the form of a final judgment as required under Fed. R. Civ. P. 54(b)." (Emphasis added). This is an erroneous statement of the terms of Rule 54(b). By its own terms, Rule 54(b) states that "the court may direct the entry of a final judgment," thus indicating that 54(b) certification is an exercise of the

Court's discretion, not a right of litigants which may be required of a Court. Sears Roebuck & Co. v. Mackey, 351 U.S. 427, 437-8 (1956). Therefore, we note at the outset that plaintiff's motion is directed to the Court's discretionary powers.

Rule 54(b) provides as follows:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reasons for delay and upon an express direction for the entry of judgment. In the absence of

such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b) provides the means by which a litigant can gain access under 28 U.S.C. §1291 to a review by the Court of Appeals of the matters certified by the trial court as a "final judgment." Indeed, plaintiff has brought his motion for "resettlement" in order to provide a clean record for an appeal to the United States Court of Appeals for

the Third Circuit." Plaintiff's Brief, p.1).

Following the standards of Rule 54(b), a District Court may certify as a final judgment an order which appears to meet the requirements, and thus a litigant may proceed to the Court of Appeals, to seek review of the "final order" pursuant to 28 U.S.C. §1291. Plaintiff has submitted proposed "resettled" forms of the two orders at issue. Both are essentially identical to the orders entered, except for the addition of a paragraph of Rule 54(b) language at the conclusion, stating the Court's finding that there exists no just reason for delay of an appeal, and directing the Clerk of this Court to enter the order as a final judgment.

The rules in this Circuit for the certification of an order as a final judgment for purposes of Rule 54(b) were set forth in Allis-Chalmers Corporation v. Philadelphia Electric Company, 521 F.2d 360 (3rd Cir. 1975), and reiterated in Curtiss-Wright Corporation v. General Electric Company, 597 F.2d 35 (3rd

Cir. 1979). The rules of 54(b) certification should be the exception rather than the rule." Curtiss-Wright, supra, at 36. As more extensively set forth by the Court in Panichella v. Pennsylvania Railroad Company, 252 F. 2d 452, 455 (3rd Cir. 1958),

> 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only "in the infrequent harsh case" as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule.

Having set forth for its guidance these general principles which guide Rule 54(b) certification, the court in Allis-Chalmers also noted that "the burden is upon the party seeking final certification to convince the dis-

trict court that the case is

the 'infrequent harsh case' meriting a favorable exercise of discretion." Allis-Chalmers, supra, at 365. In the case at bar, it is the plaintiff Hoehn who must carry this burden.

Some of the factors which the moving party must convince the court militate in favor of Rule 54(b) certification were set forth in Allis-Chalmers. These factors involve such things as the relationship between the adjudicated and the unadjudicated claims; possible mooting of further need for review; possible risk of the Circuit having to consider the same issues again; presence or absence of claims or counterclaims; and "miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." Id., at 364.

We reiterate that the burden is on the moving party to convince the Court that the

present case is the sort of "infrequent harsh case" which merits 54(b) certification. In his brief, plaintiff Hoehn has put forth only one argument intended to demonstrate that there is no just reason to delay an appeal. As to the February order, plaintiff suggests that if a post-trial appeal determines that this Court was in error in granting summary judgment in favor of defendant R. J. Reynolds, retrial of this matter would be needed. (Plaintiff's Brief, p. 7). In addition, plaintiff argues that if the Court of Appeals determines that this Court was in error in its ruling embodied in the March order, that plaintiff was not entitled to a trial by jury on Counts 1, 3, 4 and 5 of the amended complaint, once again, retrial would be called for. (Plaintiff's Brief, p. 4).

The possibility of reversal and a subsequent retrial, however, do not constitute the sort of harsh circumstances sufficient to carry plaintiff's burden of proving that the instant case merits the reversal of the presump-

tion against certification. There is, very simply, nothing unique to this case in the fact that the Court of Appeals may at a later time reverse our rulings on the matters at issue. This is a possibility inherent in every ruling by every District Court in every case on its docket.

Plaintiff has failed to address himself to any of the factors which the Third Circuit set forth in Allis Chalmers as Rule 54(b). Furthermore, the argument which he has put forward in favor of certification are not unique to his case, but rather

are risks which are present in all litigation. Accordingly, we conclude that neither of the applicable precedents nor the interests of justice support the exercise of our discretion to certify our orders of February 13, 1981 and March 4, 1981, as "final orders" under Fed. R. Civ. p. 54 (b).

Therefore, plaintiff's motion for the

"resettlement" of the orders mentioned above will be denied.

II. Defendants' Motion for Reargument

Relying on Local Rule 12I, the defendants have moved for reargument, and reconsideration of a portion of this Court's opinion of March 2, 1981. That opinion dealt with a number of issues raised by both parties to this suit; the instant application addresses only the Court's denial of defendants' motion to strike plaintiff's jury demand as to Count Two of the amended complaint.

> As to Count Two, the Court held on March 2, that,
>
> [o]nly Count Two of the Amended Complaint can be read as alleging a violation of a right which carried with it the entitlement to a jury trial. Count two appears to be an allegation of the defendants' breach of the 1972 Re-Employment Agreement. It will be plaintiff's burden at trial

> to prove not only the breach of contract which he alleges but, also the amount of damages prayed for. Since Count Two does allege a breach of contract, however, plaintiff has the right to make these showings to a jury.

(Transcript, p.4).

In the instant motion for reconsideration, defendants have drawn our attention to the Letter Opinion issued in this matter on August 13, 1979 and signed by Chief Judge Fisher. At that time, Judge Fisher was ruling on defendants' motion for dismissal for lack of subject matter jurisdiction. Defendants had argued that this Court did not have subject matter jurisdiction over this case under ERISA because the 1972 Re-Employment Agreement was not an "employee benefit plan." Judge Fisher noted,

> The pension protection afforded to employees under ERISA applies to any "employee benefit plan." 29 U.S.C. §1003 (a) . . . I believe the employment agreement in question meets [that] definition. The fact that the agreement and defendants' existing retirement plan for their other employees, the "McLean Plan," are not one and the same document, is not determinative. The ERISA definition of an employee benefit plan is not limited to a single document.

(Letter Opinion dated August 13, 1979, p.4). Specifically, in his ruling of August 13, 1979, Judge Fisher addressed the following question: "[W]hether an employment contract between an individual employee and the employer, which, by its express terms, incor-

porates within it the provisions of an existing employee benefit plan, is itself an employee benefit plan. I conclude that it is." (Letter Opinion dated August 13, 1979, p.3) (Emphasis added).

Thus, under the ruling of Judge Fisher on this Court's subject matter jurisdiction, the 1972 Re-Employment Agreement assumed a dual character. On the one hand it was obviously an "employment contract;" on the other hand, it constituted and "employee benefit plan" conferring on plaintiff all applicable rights under ERISA. By requesting that we reconsider our ruling on plaintiff's right to a trial by jury on Count Two of the amended complaint in light of this specified ruling of Judge Fisher's, defendants have raised a valid, and we think, heretofore unappreciated objection to plaintiff's Count Two jury demand."

As we pointed out in our opinion of March 2, "in order to determine if [plaintiff] is entitled to a trial by jury on a specific

count, we must "consider the character" of the count involved. In ruling as we did on March 2, we were not influenced by plaintiff's decision to shape Count Two as a breach of contract claim, since the plaintiff's language in his complaint does not establish the legal or equitable character of the claims he asserts. Plechner v. Widener College, Inc., 659 F.2e 1250 (3rd Cir. 1977). Rather, it was our opinion at that time that the 1972 Re-Employment Agreement was a contract, and that Count Two alleged albeit in rather unspecific terms, a breach of that contract. In focusing our attention on Judge Fisher's August 1979 ruling, defendants have reminded us that the 1972 Agreement serves a dual purpose in this litigation, and that in order to determine what Count Two alleges, we must determine which purpose of the 1972 Agreement Count Two alleges a breach of.

The 1972 Agreement, by virtue of its in-

corporation of the terms of the so-called "McLean Plan," gave plaintiff certain rights under ERISA. That much is clear, and it was so held by Judge Fisher. Nevertheless, the fact remains that the 1972 Agreement is not solely a pension agreement: it is an employment agreement, and, therefore, a contract. Plaintiff alleges in Count Two a "breach" of the Agreement. For purposes of a pretrial motion, where the parties' proofs are not yet fully before the Court, it might be held that such an allegation is sufficient to state a claim for breach of contract, and thus, a right to a trial by jury.

However, if one pursues the analysis of Count Two, this conclusion appears less logical. In its own words, Count Two alleges that,

> Sea-Land breached the [1972] Agreement when they terminated Hoehn's employment on January 14, 1977, and subsequently offered Hoehn a pension which was

> calculated on the earnings of Hoehn's last five years of employment and excluded the earnings for the last ten years of Hoehn's employment, even though Sea-Land had agreed to do so under the terms of the [1972] Agreement.

(¶17, Amended Complaint). Since the 1972 Agreement provided in Clause 6 that it could be "terminated by either party's giving notice in writing to the other party . . ." and since Count Two does not allege that the breach proceeded from any failure of Sea-Land to adhere to the formalities required for termination, (notice in writing), the "breach" of the 1972 Agreement which is alleged is not stated in the Allegation that Sea-Land "terminated Hoehn's employment on January 14, 1977."

Instead, the impropriety in Hoehn's termination if any there was, must be stated in the allegation that Sea-Land "susequently of-

fered Hoehn a pension" which was not properly calculated according to the terms of the 1972 Agreement. In other words, any injury suffered by the plaintiff and any relief to which he is entitled under Count Two of the amended complaint will proceed from a consideration and a determination of his rights under the McLean Plan as incorporated in the 1972 Agreement. It is clear, then, that Count Two does not allege a breach of the "contract" side of the 1972 Agreement (as, for instance, if it were alleged that the defendants failed to provide plaintiff the employment duties and responsibilities which they had promised him).

Instead, Count Two alleges, if anything, a breach of the pension responsibilities which defendants undertook to secure to plaintiff in the 1972 Agreement.

Therefore, once we determine that Count Two is actually an attempt to state a claim based on plaintiff's pension rights, "the con-

trolling issue in this [count] is whether the plaintiff is eligible for retirement benefits under the terms and conditions of the relevant pension plan." Rice v. Hutton, 487 F. Supp. 278, 279 (W.D. Mo. 1980).

The relationship between Counts One and Two is not entirely clear. It would appear that Count Two is an attempt to couch in terms of the 1972 Re-Employment Agreement the same injury and the same rights which Count One states directly in terms of ERISA. That is to say while Count One states a claim under ERISA, Count Two states a claim for breach of an agreement to pay pension benefits. While Count Two does not involve the judicial review of the pension trustees' denial of plaintiff's application for pension benefits which an ERISA claim customarily presents, it is apparently "an action to determine entitlement to pension benefits." If plaintiff is not entitled to pension benefits under the terms which the body of Count Two sets forth, then Count Two does not set forth a claim for

the "breach" of the terms of the 1972 "agreement."

Whether Count Two is redundant of Count One, and whether plaintiff has properly and correctly stated the amount of his damages under Count Two appears to us to be questions which are more properly addressed at, or after, trial in this matter. For the time being, it will suffice to say that upon consideration of the issues raised by the defendants in the instant motion, we believe that a closer reading of Count Two reveals that it states a claim based upon violation of plaintiff's pension rights. Involving as it does the determination by the trier of fact of plaintiff's entitlement to pension benefits, we believe that it is "essentially equitable in nature and as such should be tried to the court rather than a jury." Rice, supra, at 179; Sichko v. Lewis, 191 F. Supp. 68 (W.D. Pa. 1960).

Accordingly, the defendants' motion for reargument is granted, and the Court hereby

reverses its prior decision as to defendants' motion to strike plaintiff's demand for a trial by jury on Count Two of the amended complaint. Said motion to

strike plaintiff's jury demand as to Count Two will be granted. 2/

The Court will enter an appropriate form of order.

Very truly yours,

/s/ Anne E. Thompson
ANNE E. THOMPSON
U.S.D.J.

AET:mg

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2. Two other matters will also be addressed the order entered today. First, there appears in a letter to the Court from counsel for plaintiff dated April 8, 1981, a request that the Court treat the letter as a motion by plaintiff for the dismissal of the defendant's coun-

terclaim for costs, under 29 U.S.C. §1132 (g), for failure to state a claim upon which relief can be granted. The court has heretofore reserved judgment on the defendants' motion. We will put aside the fact that given the curious procedural posture in which plaintiff has chosen to make his "request" that defendants' motion for court costs be dismissed, it does not conform to the requirements of Local Rule 12(c). It is also clear that it is not yet time for the Court either to award costs or to dismiss the motion for costs. At this point in the litigation it will suffice to say that the motion for costs is still before the Court. It is a properly drawn request, pursuant to clear statutory authorization, and plaintiff's "request" that the Court dismiss the defendants motion for costs will be denied.

Second, it has come to our attention that the order which was entered by the Court

on March 4, 1981 did not contain language denying plaintiff's motion for reargument of several of the points raised in the motions decided in this case on January 5, 1981 (and embodied in our order entered February 13, 1981). The order entered this day, therefore, will deny plaintiff's motion for reargument upon which we ruled on March 2, 1981, nunc pro tunc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUSSEL F. HOEHN,	:	
Plaintiff,	:	Civil No. 78-955
v.	:	
SEA-LAND SERVICE, INC., McLEAN INDUSTRIES, INC., R. J. REYNOLDS INDUSTRIES, INC., and THE RETIREMENT BOARD, McLEAN INDUSTRIES, INC.,	:	ORDER
	:	ORIGINAL FILED May 22, 1981 Angelo W. Locascio, Clerk
Defendants.	:	

This matter having been brought before the Court on motion by plaintiff by Joseph F. Rubacky, Esq., counsel for plaintiff, for an order under the Federal Rules of Civil Procedure for "Resettlement" of the orders of this Court entered in this matter dated Februar 13, 1981 and March 4, 1981; and on motion of defendants, Jeffrey L. Reiner, Esquire, appearing, for Reconsideration pursuant to Local Rule 12(I) of a part of the order entered in this matter dated March 4, 1981; and the Court having read and consid-

ered the briefs submitted, under Fed. R. Civ. P. 78; it is on this 21st day of May, 1981,

ORDERED that the motion of the plaintiff for "resettlement" of the orders of this Court dated February 13, 1981 and March 4, 1981, be and hereby is denied; and it is further

ORDERED that the motion of defendants for reconsideration of part of the order of this Court dated March 4, 1981 is granted; and it is further

ORDERED that that part of the order entered in this matter dated March 4, 1981 which denied defendants' motion that plaintiff's jury demand be stricken as to Count Two of the amended complaint be and hereby is reversed; and it is further

ORDERED that plaintiff's jury demand as to Count Two of the amended complaint be and hereby is stricken; and it is further

ORDERED that the "request" by plaintiff in his letter to the Court dated April 8, 1981 that the Court dismiss defendants' pending Counterclaim for costs under 29 U.S.C.

§1132(g) be and hereby is denied; and it is further

ORDERED that the motion by plaintiff for reargument of several of the matters decided by the Court in its order entered on February 13, 1981, which motion for reargument was filed January 15, 1981, be and hereby is denied, nunc pro tunc.

/s/ Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 29, 1981

No. 81-2080

RUSSEL F. HOEHN,

Petitioner

vs.

SEA-LAND SERVICE, INC., McLEAN INDUSTRIES, INC. R.J. REYNOLDS INDUSTRIES, INC., and THE RETIREMENT BOARD, McLEAN INDUSTRIES, INC.,

Respondents

and

HONORABLE ANNE E. THOMPSON, United States District Judge, United States District Court for the District of New Jersey,

Nominal Respondent

Present: SEITZ, Chief Judge, VAN DUSEN, and HIGGINBOTHAM, Circuit Judges.

Petition for Writ of Mandamus and

Other Relief with brief and appendix

in support thereof

in the above-entitled case.

Respectfully,

/s/ Sally Mrvos
Clerk

nj
enc.

The foregoing Petition is denied

By the Court,

/s/ Seitz
Chief Judge

Dated: July 2, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 78-955

x-------------------------x

RUSSEL F. HOEHN,

Plaintiff,

v. OPINION

SEA-LAND SERVICE, INC., et als.,

Defendants.

x-------------------------x

Trenton, New Jersey
September 9, 1981

B E F O R E:

THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

A P P E A R A N C E S:

JOSEPH F. RUBACKY, JR., ESQ.
For the Plaintiff

MESSRS. MEYNER & LANDIS
BY: JEFFREY REINER, ESQ.
For the Defendants.

VINCENT RUSSONIELLO
Official Court Reporter
United States District Court
Trenton, New Jersey 08605

THE COURT: This case comes before the Court once again, this time on plaintiff's motion pursunt to Fed. R. Civ. P. 15(a) for leave to file a Second Amended Complaint. The facts surrounding this case have been set forth in our earlier opinions, and will not be repeated here.

Rule 15(a) provides as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Since the plaintiff has already filed an Amended Complaint, and since he does not have the written consent of his adversary for the filing

of his proposed Second Amended Complaint, it is necessary for him to seek the permission of the Court.

In Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470, 492 (3d Cir. 1978),

cert. denied, 444 U.S. 832 (1979), the Third Circuit set forth the general standard under which we must review plaintiff's Rule 15(a) request:

> [A] Rule 15(a) motion for leave to amend the pleadings is within the sound discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U. S. 321, 330 (1971); Forman v. Davis, 371 U.S. 178, 182 (1962). Although district courts are required to allow amendments freely under the terms of the Rule, certain factors, such as undue prejudice to the other party and undue delay by the movant, have been found to establish sufficient justification for the denial

of such motions. See 3 Moore's Federal Practice Section 15.08[4] at 91-94 (2d ed. 1978).

In Robinson v. Cuyler, 511 F.Supp. 161, 165(E. D.Pa. 1981), Judge Giles noted that the factors to be considered in deciding a Rule 15(a) motion included not only undue delay and prejudice, but also untimeliness, bad faith, and the futility of the proposed amendment. Therefore, we note that, while leave to amend is to be freely given, it is not, by the same token, to be given automatically. Addington v. Farmer's Elevator Mutual Insurance Company, 650 F.2d 663, 666 (5th Cir.

1981).

With this background, we turn to the motion at hand. The instant motion to file a Second Amended Complaint was filed more than three years after the filing of the original complaint in May, 1978. Furthermore, the motion was filed some 15 months after the filing of the First Amended Complaint. The

motion is therefore untimely. Furthermore, a comparison of the proposed Second Amended Complaint with the First Amended Complaint will show that the proposed changes do not rest upon any newly discovered information or any recent happening. The changes in the proposed amendment are based upon "information known to plaintff and alleged in the original complaint." Robinson, supra, at 165. Indeed, discovery has been completed in this case for more than two years, and "[t]he proposed amendments include no critical facts outside the knowledge of the plaintiffs before the completion of discovery." Burke v. Green, 422 F.Supp. 350, 359 n.17 (E.D.Pa. 1976); Waters v. Weyerhauser Mortgage Company, 582 F.2d 503, 507 (9th Cir. 1978). Therefore, the motion is delayed, as well as untimely.

In addition, we note that the timing of the motion brings with it what the Robinson court called "independent problems of prejudice and

futility."

> This prejudice results from the passage of time between cause of action and attempted amendment over three years. See, e.g., 6 Wright & Miller, Civil Section 1488, at 439-41 ("risk of substantial prejudice increases with the passage of time" i.d. 439).

Because of the age of this case, we believe that any further delay or unnecessary complication of proceedings, of whatever magnitude, would be inherently prejudicial to all parties. Reisner v. General Motors Corporation, 511 F. Supp. 1167, 1172-3 (S.D.N.Y. 1981) (denial of Rule 15(a) motion based partly on fact that a case older than three years amounts to a "judicial emergency."). Furthermore, we cannot escape noticing that the instant motion comes before us only after a long series of motions by plaintiff, all attempting to revive matters dismissed from his Amended Complaint by previous Orders of this

Court. The proposed Second Amended Complaint contains a number of these previously dismissed claims.

Finally, it appears that the proposed amendments are futile, as well. Insofar as the Second Amended Complaint is an attempt to inject back into this case matters already decided and disposed of

by this Court, it is clearly futile. To the extent that the plaintiff's proposed new complaint makes out a claim for the tort of intentional interference with prospective economic advantage (Count 6), it would appear to be barred by the applicable statute of limitations. N.J.S.A. 2A:14-1 (six years). The applicable period is six years. Swietlowich v. County of Bucks, 610 F.2d 1157, 1162 (3d Cir. 1979) (applicable limitation determined by borrowing from state statute). Whether the proposed amendments would relate back to the date of filing of the original complaint in 1978 or not, Fed. R. Civ. P. 15(c), plain-

tiff's claim, which arose in 1971 and expired in 1977, would be time-barred.

Accordingly, since the Motion to Amend is untimely, delayed, prejudicial and in whole or in part, futile, the motion is denied.

I would ask, Mr. Reiner, if you would submit an appropriate order consistent with the opinion within five days.

- - -

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RUSSEL F. HOEHN,	HON. ANNE E. THOMPSON
Plaintiff,	Civil Action No. 78-9
v.	
SEA-LAND SERVICE, INC., McLEAN INDUSTRIES, INC., R.J. REYNOLDS INDUSTRIES, INC., and THE RETIREMENT BOARD, McLEAN INDUSTRIES, INC.,	CIVIL ACTION
Defendants.	ORDER

This matter having been opened to the Court on September 9, 1981, by Joseph F. Rubacky, Esq., attorney for plaintiff, in the presence of Meyner and Landis, Esqs., attorneys for defendants (Jeffrey L. Reiner, Esq., appearing) and the Court having considered the Briefs and Affidavits filed, having heard the oral argument of counsel, and for good cause shown as set forth in the Court's oral opinion

IT IS on this 18th day of September 1981

ORDERED, that plaintiff's Motion for Leave to Serve and File and Second Amended Complaint in the above captioned matter is denied.

/s/ Anne E. Thompson
HON. ANNE E. THOMPSON,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUSSEL F. HOEHN,	
Plaintiff,	Hon. Anne E. Thompson
vs.	Civil Action #78-955
SEA-LAND SERVICE, INC., McLEAN INDUSTRIES, INC., R. J. REYNOLDS INDUSTRIES, INC., AND THE RETIREBOARD, McLEAN INDUSTRIES, INC.,	AMENDED COMPLAINT AND JURY DEMAND
	ORIGINAL FILED
	May 20, 1980
Defendants.	Angelo W. Locascio, Clerk

Plaintiff, RUSSEL F. HOEHN, residing at #51 Wardell Avenue, Rumson, Monmouth County, State of New Jersey, #07760, by way of Amended Complaint against Defendants, SEA-LAND SERVICE, INC., Mc LEAN INDUSTRIES, INC., R. J. REYNOLDS INDUSTRIES, INC., AND THE RETIREMENT BOARD, McLEAN INDUSTRIES, INC., says that:

FIRST COUNT

1. (A) The jurisdiction of this Court is founded on the existence of a question aris-

ing under particular statutes. The action arises under Public Law 93-406, Title I, §2, September 2, 1974, 88 Stat. 832; Title 29 U.S.C.A., §§ 1001 et seq., § 1132, as hereinafter more fully appears.

(B) The jurisdiction of this Court is founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of New Jersey, and defendant, Sea-Land Service, Inc., is a Delaware corporation; defendant, McLean Industries, Inc., is a Delaware corporation; defendant, R. J. Reynolds Industries, Inc., is a Delaware corporation; and defendant, The Retirement Board, McLean Industries, Inc., is believed to be a North Carolina business entity. The matter in

controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND DOLLARS ($10,000).

2. Plaintiff, Russel F. Hoehn (hereinafter Hoehn) became an employee of Sea-Land Ser-

vice, Inc. (hereinafter Sea-Land) on or about June 18, 1962.

3. Sea-Land is owned, operated and dominated as a subsidiary or affiliate corporation of McLean Industries, Inc. (hereinafter McLean). Defendant, R. J. Reynolds Industries, Inc., (hereinafte Reynolds) owns McLean as a subsidiary or affiliate corporation. Defendant Retirement Board controls and operates The Retirement Plan for employees of McLean (hereinafter The Plan).

4. Hoehn, at the request of Sea-Land, organized and operated a separate business for the purpose of acting as freight agent for Sea-Land in the State of Alaska for a period from May 1, 1964 to January 23, 1972 inclusive. Hoehn set up a separate corporation known as "Sea-Land Sales of Alaska" (hereinafter Alaska). As of January 23, 1972, Hoehn was reemployed by Sea-Land under a written agreement dated December 18, 1972 (hereinafter Agreement). A copy of the Agreement is attached hereto and made a part hereof and marked as

Exhibit "A".

5. Hoehn's employment with Sea-Land was terminated on the 14th day of January, 1977.

6. Alaska was operated as a result of an agency agreement made between Hoehn and Sea-Land. At the time the agency agreement was negotiated and entered into between Sea-Land and Hoehn, the Chairman of the Board of Sea-Land was Malcolm McLean. Malcolm McLean made the agency agreement with Hoehn and advised Hoehn that the commissions to be paid under the agency agreement would be Hoehn's but that Hoehn could set up any kind of arrangement between himself and Sea-Land which

Hoehn desired. Hoehn was referred to Sea-Land's New Jersey attorneys in order that they should prepare a written agreement between Hoehn and Sea-Land. Sea-Land hired Hoehn for his ability and the services he could render to Sea-Land in helping to develop freight business for Sea-Land in the State of Alaska. Hoehn was to be paid commissions in

stead of a salary, and the concept involved was that even though the commissions were to be paid to Hoehn, the commissions were to be directed through any sort of a business entity (e.g. sole proprietorship, partnership, corporation) acceptable to Hoehn. The main concern of Sea-Land was to have Hoehn develop business and reward Hoehn in a generous fashion for his efforts in developing such business on behalf of Sea-Land. The commission income earned for the years 1967 - 1971 was:

1967	-	$ 192,437.01
1968	-	200,383.51
1969	-	228,731.47
1970	-	324,486.68
1971	-	343,980.50
TOTAL	-	$ 1,350,019.17

The average commission income per year for the years 1967 through 1971 was approximately $270,000.00.

7. On January 23, 1972, Alaska was terminated as the freight agent for Sea-Land in the State of Alaska. Sea-Land took over the

business directly. Sea-Land agreed to hire back Hoehn to work for Sea-Land as an executive and pay Hoehn a salary. All of this was accomplished under the terms of the Agreement. The Agreement was signed by Hoehn and for Sea-Land, by Paul F. Richardson, the then President of Sea-Land.

8. It was the intention of Sea-Land at the time that Sea-Land rehired Hoehn to confer all fringe benefits on Hoehn as if he had been an employee working for Sea-Land continuously from the initial date of Hoehn's employment on June 18, 1962. One of the benefits conferred under the Agreement is a pension. Mr. Richardson, at the time the Agreement was being negotiated with Hoehn and Sea-Land, made it clear that Hoehn was not to lose any benefits which would have accrued to him if he had been an employee of Sea-Land during the time Hoehn was operating Alaska and being paid commissions instead of a salary. The parties to the Agreement in-

tended that Hoehn's commission income referred to in Paragraph 6 hereinabove would be included in the calculations in arriving at Hoehn's retirement and pension benefits.

9. At the time the Agreement was negotiated and drawn, Hoehn was not represented by a personal attorney but rather, McLean had the Agreement drawn by house counsel. It was understood at the time the Agreement was entered into that Hoehn's gross commissions earned through Alaska would be included in any computation of Hoehn's earnings for the purposes of determining Hoehn's retirement and pension benefits.

10. At the time the Agreement was being negotiated, Hoehn rejected forms of the Agreement which did not comply with the understanding that the commissions earned through Alaska would be included in any computation of Hoehn's retirement and pension benefits. Hoehn relied upon Sea-Land drafting and preparing documents which properly reflected this understanding. Hoehn relied upon the Agreement to his detri-

ment. Defendants have failed to or refuse to

include Hoehn's gross commissions earned from Alaska in computing Hoehn's retirement benefits.

11. As a consequence of Sea-Land terminating Hoehn's employment, Hoehn became eligible for all rights and benefits as a participant in The Plan which is for the benefit of the employees of McLean. A copy of The Plan is incorporated by reference in the Agreement.

12. Hoehn has applied to the Retirement Board for a statement defining his retirement pension benefits from Sea-Land. The Retirement Board refuses to recognize Hoehn as being entitled to any benefits under The Plan. Sea-Land has agreed to pay Hoehn a pension and retirement benefit which is in a substantially reduced amount from that which Hoehn would be entitled to had the gross commissions from Alaska been included in the pension computation. Sea-Land has computed Hoehn's

retirement pension benefits on Hoehn's earnings for the years 1972, 1973, 1974, 1975 and 1976, or the last five years of Hoehn's employment by Sea-Land, and totally ignored the gross commissions earned through Alaska in making such retirement benefit or pension calculation.

13. Hoehn is a participant under The Plan based on the Agreement. The Plan has not been updated in accordance with the requirements of The Employee Retirement Income Security Act, Title 29, U.S.C.A. §§ 1001 et seq. (hereinafter Erisa).

14. Hoehn, prior to the termination of his employment by Sea-Land, requested in writing from Sea-Land a statement of his retirement benefits. Sea-Land acknowledged receipt of such request of January 13, 1977 and forwarded to Hoehn a statement of benefits and retirement allowance on the forms used by the Retirement Board even though Hoehn was held not to be eligible for retirement allowances and benefits under The Plan.

15. To date, Hoehn has not received a copy of The Plan which has been updated to conform to Erisa. Hoehn is entitled to receive a copy of such updated Plan in that the Agreement incorporates The Plan by reference and makes it a part of the Agreement as stated in Paragraph 3 of the Agreement. Sea-Land, McLean, Reynolds and Retirement Board have failed to or refused to supply the updated Agreement to Hoehn.

WHEREFORE, Plaintiff demands judgment against the Defendants on the First Count for retirement benefits under the Agreement, which shall include the gross commissions paid to Hoehn through Alaska for the years 1967 through 1971, and to clarify Plaintiff's rights to future benefits under the terms of The Plan and Agreement; costs and reasonable attorney's fees; and such other relief as the Court deems appropriate.

SECOND COUNT

16. Plaintiff Hoehn includes Paragraphs 1 through 15 of the First Count and incorpor-

ates them by reference as if fully set forth and makes them a part hereof.

17. Hoehn relied upon the Agreement when Hoehn was re-employed by Sea-Land. Sea-Land breached the Agreement when they terminated Hoehn's employment on January 14, 1977, and subsequently offered Hoehn a pension which was calculated on the earnings of Hoehn's last five years of employment and excluded the earnings for the last ten years of Hoehn's employment, even though Sea-Land had agreed to do so under the terms of the Agreement.

WHEREFORE, Plaintiff demands judgment on the Second Count against defendant, Sea-Land, for breach of contract in the amount of TWO MILLION DOLLARS ($2,000,000.00), plus costs and reasonable attorney's fees; and such other relief as the Court deems appropriate.

THIRD COUNT

18. Plaintiff Hoehn includes Paragraphs 1 through 15 of the First Count and Paragraphs 16 and 17 of the Second Count and incorporates

them by reference as if fully set forth and makes them a part hereof.

19. Plaintiff Hoehn relied upon the representations of defendants that he was included in The Plan and that the commissions paid to Hoehn through Alaska were to be included for the purposes of computing pension and retirement benefits and allowances at the time Hoehn surrendered the agency business of Alaska back to Sea-Land. Such reliance by Hoehn was to his detriment; and when Hoehn applied for retirement benefits and allowances, Hoehn was advised by the Retirement Board that he was not included in The Plan, and Sea-Land offered Hoehn a pension benefit and allowance of a substantially reduced amount from that which Hoehn would be allowed had the commissions paid to Hoehn from Alaska been used and calculated in such retirement pension benefits and allowances. Hoehn was misled by the actions of directors, officers, servants and employees of Sea-Land in negotiating the Agreement.

WHEREFORE, Plaintiff demands judgment against the Defendants on the Third Count in the amount of TWO MILLION DOLLARS ($2,000,000.00), plus interest, costs and reasonable attorney's fees from the defendants; and such other relief as the Court deems appropriate.

FOURTH COUNT

20. Plaintiff Hoehn includes Paragraphs 1 through 15 of the First Count, Paragraphs 16 and 17 of the Second Count, and Paragraphs 18 and 19 of the Third Count and incorporates them by reference as if fully set forth and makes them a part hereof.

21. The actions of some of the directors, officers, employees, agents and servants of the defendants in misleading plaintiff Hoehn, to his detriment, with reference to his retirement pension benefits and allowances, were committed with purpose and malice, all of which was to the detriment of the plaintiff Hoehn.

WHEREFORE, Plaintiff demands judgment on

the Fourth Count for punitive damages against the Defendants in the amount of TEN MILLION DOLLARS ($10,000,000.00).

FIFTH COUNT

22. Plaintiff Hoehn repeats Paragraphs 1 through 16 of the First Count as if fully set forth and makes them a part hereof.

23. Because of the breach of contract by defendants failing to perform the condition of its termination agreement and provide plaintiff with a pension plan coverage based on the gross commissions of Sea-Land Sales of Alaska, Inc., there has been a failure of consideration for the said agreement and the defendants, and each of them, have been unjustly enriched by the reasonable value of the gross income Sea-Land Sales of Alaska, Inc., or its successor in interest, earned from January of 1972 to the date of the trial of this action, and could be reasonably expected to earn thereafter from the date of the trial of this action through 1989, when plaintiff Hoehn will be age 65 and the orig-

inal contract will be terminated by its own terms.

24. The unjust enrichment of the defendants amounts to the sum of one and one-half per cent (1-1/2%) of the

gross shipping revenues of Sea-Land Industries, Inc. for all transportation to and from the State of Alaska from January 23, 1972 through December 31, 1989, which is a dollar amount to be proved at trial.

WHEREFORE, Plaintiff demands judgment on the Fifth Count for the sum of one and one-half per cent (1-1/2%) of the gross shipping revenues of Sea-Land Industries, Inc. for all transportation to and from the State of Alaska from January 23, 1972 through December 31, 1989, which is a dollar amount to be proved at trial.

SIXTH COUNT

25. Plaintiff Hoehn repeats Paragraphs 1 through 16 of the First Count and Paragraphs 23 and 24 of the Fifth Count as if fully set forth and makes them a part hereof.

26. The acts of the defendants, through their agents, servants, and employees, were done with actual malice for the purpose of defrauding this plaintiff and of stealing the fruits of his industry and imagination for the financial profit of a multinational corporation, defendant Reynolds, and of its international shipping line, defendant, Sea-Land Industries, Inc.

27. Because of the deliberate acts of these defendants, they should be punished by an additional verdict of one and one-half per cent (1-1/2%) of their net worth as of the date of the trial of this action, the dollar amount of which is to be proved at trial, to deter them from similar fraudulent, malicious and dishonest conduct in the future.

WHEREFORE, Plaintiff demands judgment on the Sixth Count for the sum of one and one-half per cent (1-1/2%)

of their net worth as of the date of the trial of this action, the dollar amount of which is

to be proved at trial.

/s/ Joseph F. Rubacky, Jr.
JOSEPH F. RUBACKY, JR.
Attorneys for Plaintiff
One Essex Street
Hackensack, N.J. 07601
(201) 342-3401

Plaintiff demands a trial by jury of all issues.

/s/ Joseph F. Rubacky, Jr.
JOSEPH F. RUBACKY, JR.

Dated: May 7, 1980

PROOF OF SERVICE

I hereby certify that a copy of the with in Amended Complaint and Jury Demand has been served upon Jeffrey L. Reiner, Esq., c/o Meyner & Landis, Esqs., Gateway 1, Newark, N.J. 07102, attorneys for defendants by first class mail, with postage prepaid thereon, on May 19, 1980.

/s/ Joseph F. Rubacky, Jr.
JOSEPH F. RUBACKY, JR.

AGREEMENT

THIS AGREEMENT made and entered into on this 18th day of December, 1972, but as of the 23rd day of January, 1972, by and between RUSSELL F. HOEHN of Seattle, Washington (herein referred to as "Hoehn") and SEA-LAND SERVICE, INC., a corporation organized and existing under the laws of the State of Delaware with its principal office in Elizabeth, New Jersey (herein referred to as "Sea-Land"),

WITNESSETH THAT:

WHEREAS, Hoehn was employed by Sea-Land during the period June 18, 1962 through April 30, 1964, inclusive; and

WHEREAS, Hoehn was requested by Sea-Land to organize and operate Sea-Land Sales of Alaska for the purpose of performing sales activities in Alaska on behalf of Sea-Land, which Hoehn did and by which corporation he was employed during the period May 1, 1964 through January 23, 1972 inclusive;

WHEREAS, McLean Industries, Inc., a Delaware corporation and the owner of all the

outstanding capital stock of Sea-Land (herein referred to as "McLean"), did adopt a Retirement Plan for Employees of McLean Industries, Inc. and its subsidiaries, as of July 1, 1969 (herein referred to as the "McLean Plan"), a copy of which Plan is attached hereto; and

EXHIBIT "A-1"

WHEREAS, Sea-Land desires to terminate its relationship with Sea-Land Sales of Alaska and to perform the services which that corporation was performing for it in Alaska in its own name and behalf and to employ Hoehn, which employment is acceptable to Hoehn and which would be upon the terms, conditions and provisions herein provided:

NOW, THEREFORE, IN CONSIDERATION OF the premises and the mutual covenants herein contained, Hoehn and Sea-Land do hereby mutually covenant and agree as follows:

1. Employment. Sea-Land does hereby employ Hoehn and Hoehn does hereby accept employment by Sea-Land, as an employee, all upon the

terms, conditions and provisions herein contained.

2. Benefits. If Hoehn becomes an employee of Sea-Land or of any other subsidiary of McLean as contemplated by this Agreement, Hoehn shall be treated as, and deemed to be, an Employee as of such date of employment and a Participant under the McLean Plan and his service with Sea-Land and with Sea-Land Sales of Alaska previous to said date and specifically during the period June 18, 1962 until such date of employment shall be treated as, and deemed to be, Continuous Service and Credited Service with Sea-Land under the McLean Plan and Hoehn and his Beneficiaries shall be granted and entitled to all rights and shall be paid all benefits hereunder due a Participant under the McLean Plan on a Retirement Date as specified in the McLean Plan, as now or hereafter constituted.

3. Limitations.

(a) All terms, provisions and conditions, and particularly all definitions, of the McLean Plan attached hereto are incorporated and made a part hereof as if set out completely herein. In determining the rights, benefits and limitations of this Agreement, the provisions, terms and conditions of the McLean Plan shall apply as if set out fully herein.

(b) Anything in this Agreement or the McLean Plan to the contrary notwithstanding, if (i) Hoehn shall voluntarily terminate his employment with McLean or any subisidary other than on or after Normal Retirement Date and, without the prior written consent of Sea-Land and within a period of three (3) years following his voluntary termination of employment, becomes a Competitior, or (ii) Hoehn's employment is terminated for cause, which shall be limited to theft, dishonesty, disclosure of trade secrets, insubordination,

or other morally reprehensible conduct, then Sea-Land may permanently cancel any benefits thereafter payable hereunder to him or his Beneficiary.

(c) Nothing in the McLean Plan nor its incorporation into this Agreement, shall be construed as conferring any legal rights upon Hoehn for a continuation of employment hereunder, nor shall it interfere with the rights of Sea-Land or any Employer

to discharge Hoehn or take any action without regard to the effect which such action might have upon him hereunder or under the McLean Plan as incorporated herein.

(d) If Hoehn receives a retirement allowance or other benefits, whether paid in one or more payments, under the McLean Plan for a period of employment which is treated as Credited Service in computing any Retirement Allowances or other benefits hereunder, then

the amount of such Retirement Allowance or other benefits paid under the McLean Plan to the extent provided by contributions paid by Sea-Land (or the Actuarial Equivalent thereof) shall be deducted from the Retirement Allowances or other benefits payable hereunder; provided said amount to be deducted (other than the Actuarial Equivalent thereof) shall not exceed the amount which, but for this provision, would have been payable hereunder with respect to such period of employment.

(e) No benefits hereunder shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt to so anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; nor shall any such benefit, prior to receipt thereof by Hoehn, be in any manner liable for or subject to his debts, contracts, liabilities, engagements or torts, except as specifically provided herein. If Hoehn

becomes bankrupt or attempts to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge any benefit or interest hereunder, then such benefit or interest shall cease and terminate, and in that event, Sea-Land shall hold or apply the same to or for the benefit of Hoehn, his spouse, children or other dependents, or any of them, in such manner and in such proportions as it may deem proper.

(f) Should the McLean Plan be amended, as provided in Section 9.01, or terminated, as provided in Section 8.02, or should its benefits be reduced by reason of discontinuing, suspending or reducing contributions to such Plan, as provided in Section 8.01, at any time during the term of this Agreement, or while Hoehn should be employed hereunder, then this Agreement shall be treated as amended or terminated (insofar as the benefits herein granted are based on the McLean Plan) at the time and in the manner of the McLean

Plan or the benefits hereunder shall be similarly reduced in the amount of the reduction of benefits under the McLean Plan.

4. Intent. It is the intent of the parties hereto to make provision whereby Hoehn, if he becomes an Employee of McLean or of any of its subsidiaries, is to receive under the Mc Lean Plan and this Agreement the same rights and the sum total of benefits under both that he would have received under the McLean Plan if he had become on June 18, 1962 an Employee of Sea-Land and had remained through retirement or until death such an Employee and a Participant under the McLean Plan.

5. Law. This Agreement is entered into in Elizabeth, New Jersey and shall be construed under and governed by the Laws of the State of New Jersey.

6. Terms. This Agreement shall continue in full force and effect unless and until ter-

minated by either paty's giving notice in writing to the other party of the termination of such Agreement; provided, however, that all rights and benefits accrued to Hoehn to the date of such termination hereunder shall be treated as rights and benefits are treated under the McLean Plan in a termination of employment thereunder.

IN WITNESS WHEREOF, Hoehn has placed his hand and seal and Sea-Land has caused this Agreement to be executed in its name and on its behalf by its representative as duly authorized on, but as of, the date first above appearing.

SEA-LAND SERVICE, INC.

By /s/ Paul F. Richardson
As its

/s/ Russel F. Hoehn
Russell F. Hoehn

EXHIBIT "A-6"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RUSSEL F. HOEHN,	
Plaintiff,	Hon. Anne E. Thompson
vs.	Civil Action #78-955
SEA-LAND SERVICE, INC., McLEAN INDUSTRIES, INC., R. J. REYNOLDS INDUSTRIES, INC., and the RETIREMENT BOARD,	AMENDED ANSWER AND COUNTERCLAIM
McLEAN INDUSTRIES, INC.,	
Defendants.	

Defendants, Sea-Land Service, Inc. (hereinafter "Sea-Land"), McLean Industries, Inc. (hereinafter "McLean"), R. J. Reynolds Industries, Inc. (hereinafter "Reynolds"), and The Retirement Board, McLean Industries, Inc. (hereinafter "Retirement Board"), by way of Answer to plaintiff's Amended Complaint, say:

AS TO FIRST COUNT

1.(A) They deny that this Court has jurisdiction to hear this controversy under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et. seq.,

although the Court has denied defendants' Motion to Dismiss for lack of jurisdiction under ERISA.

1.(B) They deny that jurisdiction is founded on diversity in that the principal place of business of Sea-Land is New Jersey. They admit the states of incorporation of the corporate defendants.

2. They admit the allegations of paragraph 2.

3. In answer to paragraph 3, they admit that Sea-Land is a subsidiary of McLean, that McLean is a subsidiary of Reynolds, and that Retirement Board administers the retirement plan for employees of McLean. They deny the remaining allegations of the paragraph.

4. They admit the allegations of paragraph 4, and affirmatively aver that during the period from May 1, 1964 to January 23, 1972 plaintiff was not an employee of Sea-Land.

5. They deny the allegations of paragraph 5 and affirmatively aver that plaintiff's

employment with Sea-Land was terminated on January 31, 1977.

6. In answer to paragraph 6:

(a) Thet deny that Alaska was operated as a result of an agency agreement between plaintiff and Sea-Land; Alaska was operated as a result of an agreement dated May 1, 1964 between Sea-Land, Alaska, and Hoehn (a copy of which is annexed hereto as Exhibit A);

(b) They admit that Malcolm McLean was Chairman of the Board of Sea-Land at the time the May 1, 1964 agreemen was executed;

(c) They deny that the May 1, 1964 agreement was made between plaintiff and Mr. McLean, and they affirmatively aver that such agreement included Alaska as a party, and was signed by M.R. McEvoy, as President of Sea-Land;

(d) They are without information sufficient to form a belief as to what Mr. McLean might have then stated to plaintiff, but assert that the May 1, 1964 agreement sets forth the complete understanding of the parties, as not-

ed in paragraph 29 of such agreement;

(e) They are currently without information sufficient to form a belief as to who drafted the May 1, 1964 agreement, but deny any implication that plaintiff did not have the unrestricted choice to consult counsel in connection therewith;

(f) They deny that plaintiff was to be paid anything under the May 1, 1964 agreement; all commissions due thereunder were to be paid to Alaska;

(g) They deny all other allegations of the paragraph, except that they are without information sufficient to form a belief as to the truth of the allegation concerning the amount of commission income for the years 1967-1971 paid by Sea-Land to Alaska.

7. They admit the allegations of paragraph 7, except that they deny any implication that plaintiff had worked as an employee of Sea-Land in any capacity between May 1, 1964 and January 23, 1972.

8. They deny the allegations of paragraph 8, except that they admit that Sea-Land entered into, and has honored, the December 18, 1972 agreement, and that such agreement is the best evidence of the parties' rights and obligations thereunder.

9. They are without information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 9, but they deny any implication therein that plaintiff did not have the unrestricted choice to consult with counsel in connection therewith. They deny the second sentence of paragraph 9.

10. They are without information sufficient to form a belief as to the truth of the allegations of paragraph 10, except that they deny plaintiff's reliance on Sea-Land's proper drafting of the agreement, they deny that plaintiff relied upon the agreement to his detriment, and they admit that they have properly refused to include Alaska's gross com-

missions from Sea-Land in computing plaintiff's retirement benefits. They further affirmatively aver that the Agreement drafted did accurately reflect the intent and understanding of the parties thereto.

11. They deny the allegations of paragraph 11, and affirmatively aver that plaintiff is entitled to all rights and benefits provided for in the December 18, 1972 agreement.

12. They admit the allegations of paragraph 12, and they affirmatively aver that Sea-Land properly refused to include Alaska's gross commissions from Sea-Land in computing plaintiff's retirement benefits.

13. They deny the allegations of paragraph 13.

14. They admit the allegations of paragraph 14.

15. They are without information of the first sentence of paragraph 15, except that they admit that general distribution of the most recently amended version of the McLean

Industries Plan has properly not been effected since it is currently awaiting review by the Internal Revenue Service. They further admit that plaintiff is entitled to a copy of the Plan when it is finally approved for filing under ERISA and affirmatively aver that, at such time, plaintiff will be provided with a copy of same.

AS TO SECOND COUNT

16. They repeat their answers to the allegations of paragraphs 1 through 15 as if each were set forth herein at length.

17. They deny the allegations of paragraph 17.

AS TO THIRD COUNT

18. They repeat their answers to the allegations of paragraphs 1 through 17 as if each were set forth herein at length.

19. They deny the allegations of paragraph 19, except that they admit that the Retirement Board advised plaintiff that he did not qualify for benefits under the Plan, and

they further admit that the post-employment benefits Sea-Land has offered to plaintiff under the December 18, 1972 agreement do not reflect inclusion of the commissions Sea-Land paid to Alaska.

AS TO FOURTH COUNT

20. They repeat their answers to the allegations of paragraphs 1 through 19 as if each were set forth herein at length.

21. They deny the allegations of paragraph 21.

AS TO FIFTH COUNT

22. They repeat their answers to the allegations of paragraphs 1 through 16 of the First Count.

23. They deny the allegations of paragraph 23 and affirmatively aver that they have scrupulously performed their obligations to plaintiff under the terms of all relevant agreements.

24. They deny the allegations of paragraph 24 and leave plaintiff to his proofs.

AS TO SIXTH COUNT

25. They repeat their answers to the al-

gations of paragraphs 1 through 16 of the First Count and paragraphs 23 and 24 of the Fifth Count.

26. They deny the allegations of paragraph 26 and leave plaintiff to his proof.

27. They deny the allegations of paragraph 27 and leave plaintiff to his proof.

FIRST SEPARATE DEFENSE

Plaintiff has failed to state a claim upon which relief may be based.

SECOND SEPARATE DEFENSE

The Complaint fails to allege or set forth facts to show that defendants McLean, Reynolds, and Retirement Board did anything which would give rise to any liability to plaintiff. Therefore, the Complaint must be dismissed as against these defendants.

THIRD SEPARATE DEFENSE

The December 18, 1972 Agreement, which plaintiff asserts gives rise to his claims herein, does not purport to speak for, nor does it bind, any defendants other than Sea-Land. Therefore, the Complaint must be dis-

missed as against all defendants other than Sea-Land.

FOURTH SEPARATE DEFENSE

By virtue of an acknowledgement of Termination of Agreement of May 1, 1964 (a true copy which is attached hereto as Exhibit B) dated July 26, 1972, plaintiff acknowledged the full performance by defendant Sea-Land of all of its obligations under the Sales Agency Agreement of May 1, 1964, and released defendant, Sea-Land Service, Inc. forever from all demands, claims, actions or suits of any nature whatsoever in regard to the Agreement of May 1, 1964. The aforesaid acknowledgement of Termination, is a binding release under which plaintiff is precluded from now making claim that commissions paid by Sea-Land to Alaska should be considered for purposes of computing plaintiff's post-employment benefits.

FIFTH SEPARATE DEFENSE

Plaintiff has received and, when he makes his election in connection with post-employ

ment benefits, will receive, all sums to which he is entitled under the December 18, 1972 Agreement with Sea-Land. He has no further claim to post-employment benefits over and above that already promised to him by Sea-Land.

SIXTH SEPARATE DEFENSE

Plaintiff, by the passage of time, the execution of the July 26, 1972 agreement, and the parol evidence rule, is estopped at this late date to allege that the gross commissions received by Alaska are properly includable in computing plaintiff's post-employment benefits.

SEVENTH SEPARATE DEFENSE

Plaintiff, by virtue of executing the July 26, 1972 agreement, and making his election therein of rights he had under the May 1, 1964 agreement, has waived any claim that the commissions paid by Sea-Land to Alaska are properly includable in computing his post-employment benefits.

COUNTERCLAIM

Defendants, by way of counterclaim against

plaintiff, say:

1. Jurisdiction of this Court is based upon ERISA, 29 U.S.C. § 1001, et seq., and specifically upon 29 U.S.C. §1132. Venue is properly in this district under 28 U.S.C. §1391.

2. By virtue of the filing of plaintiff's Complaint herein, defendants have been compelled to retain, at their own expense, counsel to protect their interests, and have otherwise incurred, and will continue to incur, additional and other costs attendant to the defense of this litigation.

3. 29 U.S.C. §1132 provides that the Court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

4. Under the facts and circumstances appearing herein, defendants are entitled to the award of a reasonable attorney's fee and costs of action.

WHEREFORE, defendants demand judgment against plaintiff in the amount of a reasonable attorney's fee and their costs in defending a-

gainst the Complaint herein, as well as such further relief as to the Court shall appear just and proper.

MEYNER AND LANDIS
Gateway I
Newark, New Jersey 07102
(201) 624-2800
Attorneys for Defendants

/s/ Jeffrey L. Reiner
JEFFREY L. REINER

Dated: June 30, 1980

ADDENDUM

Although the Amended Answer served upon plaintiff did not have Exhibits A (Pa 150-170) and B (Pa 171-173) attached thereto, Petitioner submits same for the Court's convenience. Exhibit B has had the Schedule of Office Equipment intentionally omitted by petitioner who agrees to supply same to the Court or any party upon request.

Sales Agency Agreement

AGREEMENT, made this 1st day of May, 1964, by and among SEA-LAND SERVICE, INC., a corporation of the State of Delaware, having its principal place of business at Terminal and Fleet Streets, Elizabeth, New Jersey, hereinafter referred to as "SEA-LAND"; SEA-LAND SALES OF ALASKA, INC., a corporation of the State of Alaska, having its principal place of business at , Anchorage, Alaska, hereinafter referred to as "Sales Company"; and RUSSEL F. HOEHN, residing at , Anchorage, Alaska, hereinafter referred to as "Hoehn";

W I T N E S S E T H

In consideration of the mutual covenants herein contained, the parties agree as follows:

1. DEFINITION: "Fiscal month", "fiscal quarter" and "fiscal year" shall refer to a fiscal month, fiscal quarter and fiscal year

as used in the accounting policy of Sea-Land.

2. APPOINTMENT: Sea-Land appoints the Sales Company as its agent for the solicitation of orders for freight shipments to be carried by Sea-Land to and from Alaska.

3. DURATION; CONDITIONS: The appointment of the Sales Company as such agent, and the rights of the Sales Company hereunder, are effective and shall continue only as long as Hoehn is affiliated with the Sales Company and is devoting his entire time, energy and effort to the work of the Sales Company under this contract; but this appointment shall not in any event continue beyond the date when Hoehn attains 65 years of age. It is understood that these requirements shall not be deemed violated by the absence or inactivity of Hoehn for a period or periods totaling four weeks in any calendar year, or such longer

period as may be approved in writing by the President of Sea-Land for any particular cal-

endar year.

4. NAME OF SALES COMPANY: The Sales Company shall conduct its business under the name of "Sea-Land Sales of Alaska, Inc."

5. STATUS OF AGENCY: The sales agency shall be operated as an independent business, subject entirely to the Sales Company's direction and control except as herein provided, and neither Hoehn nor anyone else affiliated with the Sales Company shall be, or hold himself out to be, an employee of Sea-Land.

6. SOLE BUSINESS: The Sales Company shall engage in no business, enterprise or undertaking other than the performance of this contract.

7. CONTROL OF SALES COMPANY: Except with the written consent of the President of Sea-Land, all shares of stock of the Sales Company shall be issued to and held by Hoehn, Hoehn shall have and exercise the voting rights incident thereto without impairment, shall serve as Chairman of the Board and as President of the Sales Company and shall, except as provid-

ed herein, have and exercise effective and actual control and supervision of all phases of the operation and conduct of the Sales Company.

8. CONFLICTING INTERESTS: Neither the Sales Company nor Hoehn nor anyone else affiliated with the Sales Company in any way shall have any financial interest in a business, enterprise or undertaking competitive with Sea-Land or the Sales Company.

9. LIMITATION: The Sales Company shall not have,

nor shall it hold itself out as having, the power to make contracts in the name of or binding upon Sea-Land, or to pledge Sea-Land's credit or extend credit in its name.

10. CONDUCT OF SEA-LAND'S BUSINESS: Except as expressly provided herein, the Sales Company shall not have any authority with respect to the conduct of the business of Sea-Land, nor any right to expect that it will be conducted in any particular manner.

Without limitation of the foregoing, it is understood that the Sales Company shall have no right or authority with respect to the manner, circumstances or conditions under which Sea-Land accepts freight from any shipper, or with respect to determinations as to adjustment or compromise or non-collection of receivables.

11. CARRIAGE OF FREIGHT: Sea-Land shall continue to operate a water freight service to and from Alaska as long as the same may be lawful, profitable and desirable in the judgment of Sea-Land, and, for as long as and to the extent that such operation is carried on, Sea-Land shall carry freight to and from Alaska as space and other accomodations and facilities permit.

12. COMMISSION: Sea-Land shall pay the Sales Company for the duration of this agreement a commission at the rate of 1% of net freight revenue from freight carried to or from Alaska by Sea-Land, after deducting payments to other participating carriers, less write-offs for uncollectible accounts. An account

shall be deemed to be uncollectible for the purpose of such write-off under the circumstances and at the time it is treated as uncollectible for internal accounting purposes

by Sea-Land.

13. TIME OF PAYMENT; ADJUSTMENTS: Commissions hereunder shall be deemed to be earned upon commencement of the journey of the freight in question aboard the ship which actually carries it to or from the Alaskan port in question, and shall be due and payable on the 20th day following the close of the fiscal month in which the same are earned, except that commissions earned in the last fiscal month of a fiscal year shall be due and payable on the 50th day following the close of such month.

It is understood that Sea-Land makes adjustments in the determination of revenues for previous periods as the need appears from time to time, and that any such adjustments

made within six months of the close of any fiscal month will be reflected in adjustments of commissions for such period; it being further understood, however, that adjustments of commissions for uncollectibles need not be made within the said six-month period but may be made whenever uncollectibility is determined as provided in this agreement.

14. ADVANCES: Sea-Land, at the request of the Sales Company, shall advance to the Sales Company up to $25,000 during the first full fiscal month of this agreement and up to $10,000 in each of the eleven succeeding fiscal months of this agreement, subject to an overall limitation of $75,000, to assist the Sales Company in the commencement of its business. All sums advanced to the Sales Company or to Hoehn by or on behalf of Sea-Land prior to the effective date of this agreement

for use in commencing business in Alaska

shall be treated as having been made hereunder, and shall be credited against the said $25,000 and, as necessary, against the maximums for each succeeding month, until the credit is exhausted. All advances shall be repaid to Sea-Land by deductions from commissions otherwise due to the Sales Company for such first twelve fiscal months to the extent that said commissions are sufficient to offset the advances. If said deductions are not sufficient, then the balance of the advances shall be repaid by cash payment from the Sales Company to Sea-Land, provided that, in recognition of an understanding of the parties that the Sales Company shall be permitted to realize a reasonable profit of not less than $20,000 in the first twelve fiscal months, to the extent that commissions of $75,000 or less would produce that profit, the Sales Company shall not be obligated to repay the advance in cash to the extent that the repayment would reduce the profit of the Sales Company for said first twelve fis-

cal months below $20,000. If this agreement is terminated or expires before the expiration of said twelve fiscal months, the said figure of $20,000 shall be reduced by the proportion which the unexpired portion of such twelve months bears to the whole of said twelve months.

In determining the "profit" of the Sales Company under this section, the following shall be included: (a) the amount of any salary, wage, dividend or other form of payment from the Sales Company to or for the benefit of Hoenn, and (b) any other amounts which, in the reasonable judgment of President of Sea-Land, represent excessive and unwarranted expenditures by the Sales Company.

15. EXPENSES: The Sales Company shall pay all expenses in connection with its operations, including without limitation the cost of sales promotion, sales personnel, equipment, telephone and other communications and

all other costs and expenses except as otherwise expressly stated in this agreement. Sea-Land shall allow the Sales Company free use of any flat rate facilities leased by Sea-Land to the extent that the same may reasonably be made available without impairing the efficiency of the operation of Sea-Land and without additional cost to Sea-Land.

16. LIFE INSURANCE: The Sales Company, within 60 days after the execution of this contract, shall purchase term insurance on the life of Hoehn in the amount of $100,000, payable to the estate of Hoehn as beneficiary, and shall maintain the same in force and unchanged, except with written permission of the President of Sea-Land, throughout the life of this contract. The Sales Company shall cause a certified statement of such insurance to be provided to Sea-Land and shall make such arrangements as may be requested by Sea-Land to have notice of all premiums sent promptly to Sea-Land, the same to be paid directly by Sea-Land and deducted

from any sums otherwise due as commissions hereunder.

17. OFFICE SPACE: Sea-Land shall furnish office space to the Sales Company, free of charge, at each location in Alaska at which Sea-Land has operating offices, to the extent reasonably necessary to enable the Sales Company to carry on its business hereunder.

18. MONTHLY STATEMENT: Sea-Land shall fur-furnish a

schedule to the Sales Company within a reasonable period after the payment date for each fiscal month setting forth the date upon which the commission for said month and the adjustments for prior months are based.

19. REGULATIONS: The Sales Company shall be subject, except as otherwise specifically provided in this contract, to such policies, rules and regulations pertaining to the Sales Company operations, conduct, policies and procedures, as may be necessary, in the reason-

able judgment of the President of Sea-Land, to protect the interests of Sea-Land in the maintenance and development of its business in Alaska or elsewhere, to assure and promote the standing and good will associated with the name "Sea-Land" or "Sea-Land Service" or any variations thereof, and with personnel and other policies of Sea-Land and any other affiliated entities bearing any such combinations of words in their names, and otherwise to sustain and develop, on behalf of Sea-Land, sound relationships with the business community, governmental authorities, shippers, other carriers and with the public at large.

20. AGENT'S REPORTS AND RECORDS: The Sales Company, within 30 days following the end of each fiscal quarter, shall render a report to Sea-Land showing all commissions and any other funds received in said quarter and all monies expended in said quarter.

Upon request from Sea-Land, the Sales Company shall report all such facts and exhibit all such records, at such reasonable times

and places as may be specified, as may be reasonably necessary to enable Sea-Land to perform its

obligations and exercise its rights under this agreement. The Sales Company shall permit Sea-Land to examine and audit the Sales Company's books and records at any time at the offices of the Sales Company.

Upon the termination or expiration of this agreement, however effected, the Sales Company and Hoehn shall forthwith deliver up to Sea-Land, at its request, all records, memoranda or other materials of any kind pertaining to shippers or potential shippers or otherwise pertaining to the conduct of the business of the Sales Company in Alaska.

21. TERMINATION: This agreement may be terminated as to all parties as follows:

(a) By Sea-Land giving 30 days advance notice in writing thereof to the other parties following discovery of a knowing vio-

lation of this agreement by either;

(b) By the Sales Company giving 30 days advance notice in writing thereof to Sea-Land following discovery of a knowing violation of the agreement by Sea-Land;

(c) By Sea-Land giving 30 days advance notice in writing thereof to the Sales Company, provided Sea-Land pays the Sales Company the sum of $20,000 prior to the expiration of said 30 day period;

(d) By Sea-Land giving 30 days advance notice in writing thereof to the Sales Company, provided Sea-Land tenders to Hoehn a reasonably comparable sales agency arrangement at another location, or employment with Sea-Land with salary and benefits reasonably comparable to those Hoehn might reasonably have achieved had he remained with Sea-Land as an

employee rather than going to Alaska in connection with the performance of this contract;

provided, further, that Hoehn shall have the right of choice to invoke the termination provision under paragraph 21 (c) in the event Sea-Land elects the termination provision of paragraph 21 (d);

(e) By Sea-Land giving notice in writing thereof to the Sales Company, if there is an adjudication of bankruptcy of, or the filing of a voluntary petition in bankruptcy or the making of an assignment for the benefit of creditors by, the Sales Company.

22. PURCHASE OF ASSETS ON DEATH: If Hoehn should die before this contract is terminated or expires, Sea-Land shall purchase all the tangible assets of the Sales Company used or useful in the performance of the Sales Company's business under this contract, and the Sales Company shall sell all such assets to Sea-Land, at the net book value of such assets at the said date of death. This provision shall not apply to any assets subject to liens or encumbrances or to which the Sales Company cannot deliver clear title.

23. GOOD WILL; TRADE NAMES &c.: Except as may be reasonably required for and during the performance of duties under this agreement, neither the Sales Company nor Hoehn shall acquire any rights, title or interest to or under any good will, trade name, copyright or any other right or property of Sea-Land, and the Sales Company and Hoehn will, at the request of Sea-Land, assign all their right, title and interest in and to such right or property to Sea-Land. Without limitation of the foregoing, it is specifically understood that the name "Sea-Land" or

"Sea-Land Service" or "Sea-Land Service of Alaska" or "McLean" and any variation of any of them shall be included within the said rights and property so restricted, and that no such words or phrases or symbols thereof or references thereto will be available to or used in any way by the Sales Company or by Hoehn thereafter.

24. UNFAIR COMPETITION: For a period of one year following the termination or expiration of this agreement, however effected, neither the Sales Company nor Hoehn shall engage in any sales or sales development work in or for Alaska in connection with motor or water freight which is competitive with Sea-Land, or in any other activity competitive with Sea-Land, in or pertaining to Alaska in which the knowledge or contacts or status acquired by the Sales Company or by Hoehn under this contract would be of significant business advantage to it or to him. It is understood that this shall apply to the Sales Company and to Hoehn whether as principal or as agents or employees of another or others.

25. HOEHN AND SALES COMPANY GENERALLY: It is understood that any limitation or obligation imposed upon the Sales Company hereunder shall, except as the context may dictate otherwise, be binding upon Hoehn as if specifically and individually named; it is further understood that receipt by Hoehn, in-

dividually or otherwise, of any money, notice, report, statement or other thing of any kind under this agreement shall constitute receipt by the Sales Company as well; and it is further understood that receipt by the Sales Company of any notice, report, statement or other writing under this agreement shall constitute

receipt by Hoehn as well.

26. RIGHTS AND DUTIES BETWEEN SALES COMPANY AND HOEHN: It is understood that Hoehn enters into this agreement in consideration of the privileges and opportunity afforded to him by virtue of its terms, and binds himself to Sea-Land as provided herein, as the Sales Company does for itself, and that this agreement is intended to bind the Sales Company and Hoehn to Sea-Land, and Sea-Land to the Sales Company and Hoehn, but shall not be taken, except as may expressly be provided herein, to bind the Sales Company and Hoehn to one another. It is contemplated that the rights and

duties of the Sales Company and Hoehn to one another will be the subject of a separate agreement or agreements between them.

27. GOVERNING LAW: This agreement is understood and agreed to be made and to be performed pursuant to the laws of the State of New Jersey and shall be interpreted and enforced pursuant thereto.

28. ASSIGNMENT: Neither the benefit nor the burden of this agreement shall be assigned or transferred, in whole or in part, (a) by the Sales Company or Hoehn in any circumstances or (b) by Sea-Land to anyone other than a successor in interest to the business of Sea-Land.

29. ENTIRE AGREEMENT; CHANGES: This writing expresses the entire understanding and agreement among the parties without exception, other than as expressly provided, and shall not be amended or supplemented except by a writing properly executed by all parties.

30. NOTICES: Any notice or transmittal hereunder

shall be deemed sufficiently given or transmitted if sent by mail, postage prepaid, to the following respective addresses, or to such other address as the addressee in question may designate by notice in writing to the other parties:

Sea-Land: Sea-Land Service, Inc.
P.O. Box 1050
Elizabeth, New Jersey
Attention: M. R. McEvoy,
President

Sales Company: Sea-Land Sales of Alaska, Inc.

Anchorage, Alaska

Hoehn: Russel F. Hoehn

Anchorage, Alaska

31. EFFECTIVE DATE: This agreement shall be deemed to have become effective on the first day of the fiscal month of May, 1964.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals, or caused these presents to be signed by their

proper corporate officers and caused their corporate seals to be affixed, the day and year first above written.

SEA-LAND SERVICE, INC.

/s/ (Not Legible)
Secretary

/s/ M.R. McEvoy
By M. R. McEVOY,
PRESIDENT

SEA-LAND SALES OF ALASKA, INC.

/s/ Jean M. Hoehn
Secretary

/s/ Russel F. Hoehn
By Russel F. Hoehn,
PRESIDENT

/s/ Russel F. Hoehn
RUSSEL F. HOEHN
(Individually)

ACKNOWLEDGEMENT OF TERMINATION OF AGREEMENT OF MAY 1, 1964

RUSSCO INCORPORATED (formerly Sea-Land Sales of Alaska, Inc. and hereinafter referred to as "Sales Company") and RUSSEL F. HOEHN (hereinafter "Hoehn") and SEA-LAND SERVICE, INC. (hereinafter "Service") having agreed to termination of that Sales Agency Agreement by and among them entered into on May 1, 1964 and the agency existing thereunder; and

Hoehn having been reemployed by Service, now therefore

1. Sales Company and Hoehn do hereby each for itself or himself and on behalf of its or his heirs, successors and assigns and each of them:

a. Acknowledge that such termination was effected in full compliance with Paragraph 21(d) of said Agreement; and

b. Acknowledge that Hoehn elected not to invoke the termination provisions under Paragraph 21(c) as permitted by Paragraph 21(d); and

c. Acknowledge receipt by Sales Company of payment of the sum of $8,442.69 from Service in payment for all of the office equipment and supplies listed in Exhibit A attached hereto; and

EXHIBIT B

d. Acknowledge the full performance by Service of each and every of Service's obligations under the Agreement and hereby forever releases, remises and discharges Service, its officers, employees and agents from all demands, claims, actions or suits of any nature whatsoever which either or both of them ever had, now has or have, or may have or claim to have in regard to said Agreement; and

e. Acknowledge that "Sea-Land" and all names, titles, trading styles and service marks utilized by it or him under the Agreement were and are and remain the sole property of service; and

2. Any and all rights, title or inter-

est to or under any good will, trade name, copyright or any other similar or like right or property acquired by it or him in the performance of the Agreement and all right, title or interest therein or thereto be and hereby is and are assigned to Service and any and all interest in or the use thereof be and hereby is forever released and remised to Service.

Dated: July 26th, 1972 RUSSCO INCORPORATED

By: /s/ Russel F. Hoehn

Title: President

RUSSEL F. HOEHN

By: /s/ Russel F. Hoehn

SEA-LAND SERVICE, INC.

By: /s/ J.A. Baker

Title: V.P. West Coast

R. J. REYNOLDS INDUSTRIES, INC.

SECRETARY'S CERTIFICATE

CR78-103

I, C. F. Benbow, Secretary of R. J. REYNOLDS INDUSTRIES,INC.,a Delaware corporation, (the "Company"), do hereby certify that attached hereto as Annex A is a true and correct copy of certain resolutions duly adopted by the Executive Committee of the Company at a meeting held on April 6, 1978, at which meeting a quorum for the transaction of business was present and acting throughout; and that such resolutions are in full force and effect as of the date hereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the Company this 7th day of April, 1978.

/s/ C.F. Benbow
C. F. Benbow

(SEAL)

I, Leo C. Wilkerson, an Assistant Secretary of R. J. REYNOLDS INDUSTRIES, INC., do hereby certify that C. F. Benbow is on the date

hereof the Secretary of R. J. REYNOLDS INDUSTRIES, INC., and that the signature of C. F. Benbow appearing above is his true and genuine signature.

Date: April 7, 1978

/s/ Leo C. Wilkerson
Leo C. Wilkerson

FILED
April 11 1978
10 A.M.
ANGELO W. LOCASCIO

ANNEX A

RESOLVED: That with approval of management, counsel (Davis Polk & Wardwell) be and they are hereby authorized to appear in the United States Court of the District of New Jersey on behalf of Sea-Land Service, Inc.; to waive indictment and upon the returning of an Information in that Court against Sea-Land Service, Inc. alleging a crime to wit, the violation of 18 U.S.C. Section 371, in that Sea-Land Service, Inc. did conspire to defraud the United States by impeding, impairing, obstructing and defrauding the lawful government of the Federal Maritime Commission in its enforce-

ment of the provisions of the Shipping Act of 1916 in violation of Title 18 United States Code Section 371, said counsel are authorized to enter a plea of "guilty" on behalf of Sea-Land Service, Inc. upon condition that counsel obtains an agreement satisfactory to themselves that the United States will not file any further criminal charges other than possible criminal charges under Title 26 of the United States Code against Sea-Land Service, Inc. or its subsidiaries relating to the conduct

which was the subject of the grand jury investigation - to wit, the subject matter of the R. J. Reynolds Industries, Inc. questionable payments disclosures of May 28, 1976 and September 10, 1976 as revealed to the office of the United States Attorney for the District of New Jersey in documents and testimony furnished to that office or investigators working with that office in the course of the investigation and further be it

RESOLVED: That Sea-Land Service, Inc. and its Board of Dirctors are hereby authorized to extend the above authority to counsel (Davis Polk & Wardwell).

Opposition

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN RE RUSSEL F. HOEHN

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRITS

Meyner and Landis, Esqs.
Robert B. Meyner, Esq.
Counsel for Respondents
Sea-Land Service, Inc.
McLean Industries, Inc.
R. J. Reynolds Industries, Inc.
The Retirement Board, McLean Industries, Inc.
Gateway I - Suite 2500
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January 14, 1982

QUESTIONS PRESENTED

1. Should the Supreme Court of the United States exercise its discretion and issue a Writ of Mandamus to the United States District Court for the District of New Jersey to reinstate plaintiff's jury demand in the subject litigation?

2. Should the Supreme Court of the United States exercise its discretion to issue a common law Writ of Certiorari in the present circumstances of the subject litigation?

DESIGNATION OF CORPORATE RELATIONSHIPS

Defendant Sea-Land Service, Inc. is a wholly-owned subsidiary of Sea-Land Industries Investments, Inc. Sea-Land Industries Investments, Inc. is a wholly-owned subsidiary of defendant R. J. Reynolds Industries, Inc., a publicly-owned corporation. Defendant McLean Industries, Inc. no longer exists. The functions of what formerly existed as McLean Industries, Inc. have been divided between Sea-Land Industries Investments, Inc. and Sea-Land Industries, Inc. Sea-Land Industries, Inc. is a wholly-owned subsidiary of Sea-Land Industries Investments, Inc. Defendant Retirement Board, McLean Industries, Inc. has no independent identity. Its functions are split between Sea-Land Industries, Inc. and Sea-Land Industries Investments, Inc.

Defendants-respondents are not at present aware of the existence of any other publicly-owned corporation, not a party to this litigation, having a financial interest in the out-

come of the litigation which is the subject of the instant petition.

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STATEMENT OF THE CASE

Defendants will not burden the Court with a complete restatement of the facts and procedural history of this case. They do, however, take issue with certain of the statements plaintiff has made in his Statement of the Case, and are, therefore, constrained to correct certain misstatements contained therein.

Plaintiff was an employee of defendant Sea-Land Service, Inc. (hereinafter "Sea-Land"). In 1964 plaintiff, his wholly-owned corporation and defendant Sea-Land entered into a Sales Agency Agreement (Petitioners Appendix (hereinafter "Pa.") 150 et seq.). The purpose of this tripartite agreement was the establishment of a sales agency in the state of Alaska which would solicit business on behalf of Sea-Land; it was not, as plaintiff claims, "to start an ocean shipping line between Alaska and the West Coast of the lower

forty-eight states." Plaintiff's Petition (hereinafter "PP") at 12-13. Plaintiff never operated any ocean shipping line while in Alaska. Upon the execution of the Sales Agency Agreement plaintiff was no longer an employee of Sea-Land, but rather an employee of his wholly-owned corporation.

Although plaintiff premises nearly all of his claim as to the termination of the Sales Agency Agreement upon the "great jealousy" of certain officers of Sea-Land (PP at 13), and that these officers "falsely represented to plaintiff" that the Sales Agency Agreement could be terminated either by the payment by Sea-Land of $20,000.00 or by offering plaintiff a full-time position within Sea-Land itself (PP at 14), the undisputed record belies these contentions. Moreover, the individuals deemed "culpable" by plaintiff are not even joined as defendants in this case.

The Sales Agency Agreement itself contained provision for the termination of

that Agreement by the parties. (See Pa. 162-63, ¶21). Paragraph 21(c) provided that the Agreement could be terminated upon the payment of $20,000 by Sea-Land to plaintiff's wholly-owned sales company. (Pa. 163). Paragraph 21(d) provided for the termination of the Agreement upon re-employment by Sea-Land of plaintiff, but that plaintiff could opt to terminate the Agreement under Paragraph 21(c) if he wished. (Pa. 163-64). Thus, plaintiff's statement that the Sales Agency Agreement was terminated under a "threat" (PP at 14) boils down to nothing more than an exercise by Sea-Land of its contractual right, which right went unchallenged by plaintiff for the next six years. There is nothing in the record to indicate, or even imply, that the Agreement was not terminated pursuant to its express terms.

Because plaintiff Hoehn was not an employee of Sea-Land during the years he was employed by his wholly-owned corporation

in Alaska, those years could not be recognized as constituting credited service for purposes of entitling Hoehn to rights under the pension plan then in effect for employees of Sea-Land. Notwithstanding the fact that the pension plan provision regarding the time in service necessary for an employee to become a participant in the Plan barred Hoehn's participation therein, Sea-Land, upon its re-employment of Hoehn in 1972, undertook a separate corporate obligation to provide Hoehn with pension benefits upon his retirement. That corporate obligation was to count the eight years that Hoehn was an independent contractor as years of Sea-Land service for purposes of computing his total years of employment with Sea-Land.

Had Hoehn remained in the employ of Sea-Land for a long enough period of time after his return from Alaska, he would have become a vested participant in the McLean Plan. He did not. As a consequence, Hoehn's right to any pension at all (upon

his reaching a permissible retirement age) depends upon the terms of the offer of such benefits extended by Sea-Land and incorporated into the Agreement dated December 18, 1972 (Pa. 127, et seq.).

What this 1972 Agreement did, in essence, was to count, as continuous credited service for purposes of entitling Hoehn to any pension benefit at all, the years Hoehn was in Alaska - not as a Sea-Land employee, but rather as an employee of his wholly-owned sales agency. The dispute giving rise to the instant litigation is not whether Hoehn is entitled to any pension benefit (which he clearly would not be under the terms of the McLean Plan) but rather the amount of the pension benefits to which he is entitled under the terms of his 1972 Agreement with Sea-Land. (Pa. 127-35). It thus poses for review by the District Court the question whether the calculation of Hoehn's pension benefits was correct.

So that the Court can fully appreciate the true nature of the controversy, we mention that the "salary" upon which plaintiff bases his claim for pension benefits is the average of the annual gross revenues of the Alaskan sales agency for the period 1967-71, a sum amounting to approximately $270,000 per year (Pa. 114). Such sum is, during those years, between four and six times the actual salary paid by the sales corporation to Hoehn, and over five times the salary Hoehn received upon his return to Sea-Land in 1972. Moreover, out of the Alaskan sales agency's gross revenues, the salaries of 8-9 salesmen were paid, as well as all other expenses of running a corporation with gross revenues of over a quarter million dollars annually.

Sea-Land, of course, has agreed to pay Hoehn a pension based upon his salary during the relevant years. However, Hoehn, who never received more than his salary, and, significantly, was not even the recipi-

ent of the monies paid by Sea-Land, demands a pension based upon the gross revenues of the Alaskan sales agency. This is, in a nutshell, the full substance of the litigation.

SUMMARY OF ARGUMENT

Plaintiff's petition for the issuance of the extraordinary writ of mandamus should be denied inasmuch as he has failed to establish that this case presents the extraordinary circumstances under which such relief should be granted, and, in any event, the rulings of the District Court striking plaintiff's jury demand were entirely proper and consistent with the relevant decisional law, since all claims presented by plaintiff seek "equitable" as opposed to "legal" relief.

Plaintiff's petition for the granting of the common law writ of certiorari should be denied inasmuch as the interlocutory rulings of the District Court which he seeks to have this Court review at this time may be reviewed, if necessary, in the ordinary course of appellate events after trial.

REASONS WHY WRITS SHOULD NOT BE GRANTED

POINT I

THE SUPREME COURT OF THE UNITED STATES SHOULD DENY PLAINTIFF'S PETITION FOR THE ISSUANCE OF THE EXTRAORDINARY WRIT OF MANDAMUS UNDER THE FACTS OF THIS CASE.

At the outset we note that plaintiff has simply ignored the mandatory criteria of Rule 26 of this Court as to the issuance of extraordinary writs. That Rule states:

> "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

At no point in his petition does plaintiff address the salient provisions of this Rule. Instead, he constructs his legal argument as to why the writs should be granted by proceeding from an irrelevant premise to reach an erroneous conclusion.

As Rule 26 obviously states, the relief plaintiff seeks "is not a matter of right, but of discretion sparingly exercised." Under the Rule, this discretion is ordinarily granted only when the petitioner has convincingly established to this Court's satisfaction that certain specified criteria have been met. We next proceed to show that these criteria are not fulfilled here.

The first criterion is that the writ sought will be in aid of this Court's appellate jurisdiction. The present case does not fall within the purview of this requirement. Here there is no res which is in immediate danger of being destroyed or dissipated; the petitioner will have the opportunity to seek appellate review by the Third Circuit and ultimately by this Court of his claims in the ordinary course after trial. (Of course, if he prevails before the District Court within the confines of the case, as presently constituted, he will have no reason to invoke this Court's or

the Third Circuit's power of review). At that time the appellate courts will have before them a complete record upon which they can review the entirety of the trial proceedings, rather than being faced with having to make a determination in a factual vacuum. Thus, here the appellate jurisdiction of this Court will not be aided by the granting of the instant petition.

The second criterion is that exceptional circumstances exist; here they do not. Petitioner faces no prejudice not confronting any litigant who receives an adverse ruling during the course of any trial. He has the right to pursue the claims presented here through the ordinary appellate process after the conclusion of the trial. If every litigant who is disappointed with a trial court's rulings could be granted review by this Court, piecemeal appeals would inundate this Court. This is certainly not the intent of the Congress. As articulately held by the District Court in

its Opinion on Hoehn's Motion for Rule 54(b) finality:

> "The possibility of reversal and a subsequent retrial, however, do not constitute the sort of harsh circumstances sufficient to carry plaintiff's burden of proving that the instant case merits the reversal of the presumption against certification. There is, very simply, nothing unique to this case in the fact that the Court of Appeals may at a later time reverse our rulings on the matters at issue. This is a possibility inherent in every ruling by every District Court in every case on its docket." (Pa. 80-81)

The final criterion to be fulfilled in order to make out a case for the issuance of an extraordinary writ is that adequate relief cannot be had from any other court. This is simply not true here. Hoehn, like every other litigant, can appeal from an adverse final judgment after trial. He cannot establish that such a course of action is precluded to him. In fact, Hoehn may receive the relief he seeks at a trial; in such a case he would, obviously, not appeal anything. Thus, his instant petition is at best premature,

since no one knows what his status will be after trial. If he loses, he can appeal as of right; if he wins, the relief he seeks here is moot.

As the foregoing clearly reveals, petitioner cannot establish, under the restrictive provisions of Rule 26, his right to the issuance of the extraordinary writ of mandamus which he seeks. Notwithstanding this, however, we proceed to show that the ruling of the District Court striking plaintiff's jury demand was entirely proper and consistent with the statements of the law as provided by this Court, the Fifth Circuit Court of Appeals and the Seventh Circuit of Appeals.

The subject matter jurisdiction of the federal courts over this litigation is premised entirely upon plaintiff's alleged right to sue under the civil enforcement provisions of the Employees Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, et seq., specifically 29 U.S.C.

§1132. Without the presence of this singular jurisdictional entitlement, plaintiff's claims must necessarily be removed to the courts of the State of New Jersey, as they all arise under state law and he has no other independent jurisdictional basis upon which he could prosecute his claims in federal court. Since ERISA provides Hoehn with the sole justification for suing in federal court, we must examine that statute, and the decisional law construing it, in order properly to evaluate his claims to a jury trial in this litigation.

ERISA is a statute which created legal rights and liabilities which were foreign to the common law. This Court has observed that when a court is confronted with the problem of construing the rights and liabilities of litigants under such statutes, including a claimed right to a jury trial, a court must first look to the statutory language for guidance, then to the legislative history, and then to the "pre-merger

custom with respect to such questions." Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

The civil enforcement provisions of ERISA are devoid of any statement of statutory entitlement to a trial by jury. See 29 U.S.C. §1132. Nor is a review of the legislative history of this statute of any particular assistance in this regard, for it too is silent on the subject. It becomes necessary, then, to analyze whether a right to a jury trial existed at common law prior to 1789 in actions similar to those permitted under ERISA. Such an analysis has been undertaken by the Seventh Circuit Court of Appeals in Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981), and by the Fifth Circuit in Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980). In both Wardle and Calamia, the Circuit courts determined that actions brought pursuant to ERISA do not entitle the parties to a trial by jury.

In Wardle the court was called upon to determine whether an ERISA-based claim for compensatory and punitive damages carried with it the right to a jury trial. After initially noting that "the complaint styled itself as one for compensatory damages of $92,400, the amount of benefits that Wardle estimated would accrue during his lifetime, punitive damages of $250,000, reasonable attorneys fees and costs, and all other just and proper relief," 627 F.2d at 823, the Seventh Circuit turned to an analysis of the statute, the legislative history and to the common law. See id. at 828-30.

The Wardle court's recitation of the common law treatment of suits in the nature of that brought by Hoehn here is to the effect that the alleged cause of action is unquestionably equitable:

> "We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable. Such suits under the law of trusts have existed for quite a while in state courts and have

> been entertained in federal courts under their diversity jurisdiction. These suits have been considered equitable in character. [Citations omitted]. This conclusion has been based primarily on the law of trusts, which provides a beneficiary with a legal remedy only with respect to money the trustee is under a duty to pay unconditionally and immediately to the beneficiary. Restatement (Second) of Trusts §§197-198 (1959). [footnote omitted]. Thus the most reasonable interpretation is that Congress intended to provide general federal jurisdiction over these equitable suits that had traditionally been brought in state courts." 627 F.2d at 829. (emphasis added).

As noted, this Court last year denied certiorari in Wardle.

The only exception to the treatment of claims like plaintiff's as being solely equitable is, as stated in the above quotation, where the plaintiff is entitled to an unconditional and immediate payment of money by the trustee. Suits falling within this limited exception are exemplified by cases such as Dixon v. Northwestern National Bank of Minneapolis, 297 F.Supp. 485 (D. Minn. 1979), wherein the terminated employees were entitled, under the applicable profit-sharing

trust, to an immediate post termination payment of their entire account. Here, pursuant to the terms of the pension plan, retirement benefits are paid on a monthly basis, commencing on either regular, early, or postponed retirement date, through actual date of death. Significant for purposes of the inapplicability of the exception noted in Wardle, payment, on an immediate and unconditional basis, of plaintiff's lifetime pension benefits, is simply not available to him.

The footnote omitted from the above quotation from Wardle recognized this attribute common to essentially all pension plans:

> "We do not think that if Wardle had a right to benefits, he would be entitled to immediate and unconditional payment of all the benefits he would receive if he lived no shorter and no longer than his life expectancy." Id. at 829 n.19.

We pause at this point to underscore the fact that, notwithstanding the presence of an express or implied employment agreement, the courts have had no difficulty re-

jecting the assertion that a right to a jury trial inheres in situations of this sort. It must be remembered that lawsuits under ERISA, as at common law, have at their core an employer-employee relationship evidenced by either express or implied employment agreements. Both common law and ERISA claims for pension benefits are founded upon the rights flowing from such express or implied agreements. Indeed, all claims under ERISA evolve from the underlying employment relationship and attendant agreements or undertakings. Thus, the fact that a written employment agreement is involved does not take the lawsuit out of its traditional mold and metamorphose it into a damage action for breach of contract. To hold otherwise ignores the background against which the Wardle decision rests.

The Fifth Circuit in Calamia came to the same conclusion as the Wardle court with respect to the equitable nature of the cause of action alleged. The complaint in

Calamia alleged that, as is the case here, the pension plan computation of monthly benefits was too low. The relief there sought was that the court "declare [plaintiff's] rights under the pension [plan] [as is the case in Count 1 herein] and to grant compensatory and punitive damages [as is the case in Counts 2 and 4 herein]." 632 F.2d at 1236.

The District Court struck plaintiff's jury demand and, after a bench trial unfavorable to plaintiff, an appeal was taken. With respect to the assertion that a jury trial was required, the Circuit opinion in Calamia noted:

> "The mere fact that the appellant would receive a monetary award if he prevailed does not compel the conclusion that he is entitled to a jury trial." Id. at 1236-37.

The court went on to adopt the Wardle holding, and, with respect to the underlying nature of the type of claim brought by Hoehn, opined:

> "[T]he court in Wardle examined prior cases and determined that similar claims were previously considered equitable and that the kind of determination required - whether the pension fund acted arbitrarily and capriciously - was one traditionally performed by judges." Id. at 1237.

The analysis and rationale employed by the courts in Wardle and Calamia are, we submit, sound and the conclusion reached in those decisions that ERISA does not bring with it an entitlement to a trial by jury as to ERISA-based claims is correct.

Plaintiff, without an attempt to distinguish or even to cite the Court to Wardle and Calamia, rests his argument upon Beacon Theatres,Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). Neither cited decision is, however, relevant to the facts of this case. Both Beacon Theatres and Dairy Queen concerned the question whether a jury trial is compelled as to legal issues in litigation when those legal issues are intertwined with, or incidental to, claims to equitable relief. These decisions state that as to

the legal issues a party is entitled to a trial by jury, and that a court may not permissibly try the equitable issues first, thus potentially denying a party a jury trial on the purely legal issues in the litigation.

While plaintiff apparently states the correct ruling of this Court on these issues, the reliance of Hoehn upon Beacon Theatres and Dairy Queen is misplaced. In the instant litigation, there exist no "incidental" legal claims appended to claims for equitable relief. In fact, Hoehn raises no "legal" claims at all; as we show below, all of the relief sought by petitioner in his Amended Complaint is in the nature of equitable relief. As a result, the District Court correctly struck his jury demand.

In a well reasoned opinion, following receipt of briefs and spiriced oral argument, the District Court struck plaintiff's jury demand on the basis that all of the claims

asserted in the Amended Complaint are equitable in nature, and the pre-merger custom was that they were to be tried to the court. As to Count One, the court adopted the rulings of Wardle and Calamia and found that Hoehn has not right to a jury trial on his ERISA claim. (Pa. 54-55). Count Five carries no right to a jury trial in that it is a claim for recission and restitution -traditional equitable remedies. (Pa. 55). Count Three "contains several requests to be made whole via traditionally equitable remedies" and as a result there is no right to a trial by jury. (Pa. 55-56). Count Four is a restatement of Count Three, and thus no jury trial is independently warranted. (Pa. 56). Count Six, a punitive damage claim, had previously been dismissed on January 5, 1981, and was no longer part of the case. (Pa. 50). (As to that Count, the dismissal of which Hoehn also asks for current review by this Court, the District

Court held that, pursuant to New Jersey decisional law, punitive damages are not available in breach of contract cases. (Pa. 39-42)).

With respect to the Motion to strike the jury demand as to Count Two, granted by the District Court upon defendants' Motion to reargue the point, the District Court appreciated the fact that, despite Hoehn's categorization of his claim in Count Two as one resting upon a breach of contact, and looking beyond the language employed, it becomes evident that plaintiff's Count Two claim "alleges, if anything, a breach of the pension responsibilities which defendants undertook to secure to plaintiff." (Pa. 89). Since Count Two is "an attempt to state a claim based upon plaintiff's pension rights" (Pa. 89), it is "an action to determine entitlement to pension benefits" (Pa. 90) and under ERISA (which is the statutory basis for such a claim, see 29 U.S.C. §1132), as interpreted by the Wardle

and Calamia courts, Hoehn is not entitled to a jury trial as to allegations made in Count Two of his Amended Complaint.

For the foregoing reasons, plaintiff's petition for the issuance of the extraordinary Writ of Mandamus, heretofore summarily rejected by the Third Circuit Court of Appeals (Pa. 98-99), to compel the District Court to reinstate his jury demand should be denied. Plaintiff's application fits neither the requirements of Rule 26 of this Court nor does he make even a colorable showing that the District Court erred in its handling of the case to date.

POINT II

THE SUPREME COURT OF THE UNITED STATES SHOULD NOT GRANT PLAINTIFF'S PETITION FOR THE ISSUANCE OF A COMMON LAW WRIT OF CERTIORARI

Plaintiff asks this Court to issue a common law writ of certiorari to review the actions of the District Court in granting summary judgment in favor of defendant R. J. Reynolds Industries, Inc. as to all counts of the Amended Complaint and in refusing to permit plaintiff to file a Second Amended Complaint. He has failed completely to show why this Court should issue such a writ.

Rule 27.4 of this Court requires that petitioner "set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process." In an attempt to satisfy this mandate, plaintiff notes that only interlocutory orders have been entered in this proceeding and that the

District Court has refused to convert any of these interlocutory orders into final judgments pursuant to the provisions of Fed.R.Civ.P. 54(b).

The common law writ of certiorari is one of the writs issuable under the All Writs Statute, 28 U.S.C. §1651(a). Its use is traditionally limited to situations in which there is no adequate established remedy. As an extraordinary writ, its use is generally confined to extraordinary situations.

As this Court has noted in United States Alkali Export Association, Inc. v. United States, 325 U.S. 196, 203 (1945):

> "The writs may not be used as a substitute for an authorized appeal; and where ... the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews."

We submit that the circumstances of this

case do not call for this Court to exercise its discretion to issue the extraordinary writ of common law certiorari.

Plaintiff seeks first, by virtue of his petition, review by this Court of the District Court's action in granting the motion brought by defendant R. J. Reynolds Industries, Inc. for summary judgment as to all counts. This is not a final judgment. Rule 54(b) of the Federal Rules of Civil Procedure provides that

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than

> all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Under the express terms of the rule, and apart from the facts that the order is "subject to revision at any time...," and that Reynolds remains in the case on its counterclaim, the order dismissing Reynolds is not a final judgment. It can only become final "upon an express determination that there is no just reason for delay...," a discretionary decision reversible only under the most compelling of circumstances.

Based upon the clear wording of the Rule, and the thoughtful analysis given the application by the District Court (Pa. 80-81), it is evident that the standards for the discretionary action sought to be extraordinarily reviewed for a second time (Pa. 98-99) were scrupulously followed. See Allis-Chalmers Corp. v. Philadelphia

Electric Co., 521 F.2d 360 (3d Cir. 1975) and Curtiss-Wright Corp. v. General Electric Co., 597 F.2d 35 (3d Cir. 1979), vacated, 446 U.S. 1 (1980). As a result, plaintiff's application for piecemeal review of his case should not be granted.

Plaintiff next asks this Court to review the ruling of the District Court denying plaintiff's motion to file a second amended complaint. This determination, under Fed.R.Civ.P. 15(a), is addressed to the sound discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971). The District Court here exercised that discretion and denied plaintiff's motion, finding it to have been untimely made (Pa. 103-04), prejudicial (Pa. 104-05) and futile. (Pa. 105-107).

As can easily be seen from a review of the District Court's opinion on this aspect of the matter (Pa. 105-07), the proposed amendment, made on the eve of the trial,

added nothing to the case. The futility of the amendment, therefore, was as manifest as the fact that the District Court's determination was made on both a procedural and substantive basis. In other words, Hoehn was in no way prejudiced by the District Court's ruling; the substance of the proposed amendments were considered by the court in connection with all motions then pending or earlier ruled upon. This ruling was entirely proper and may be reviewed in the ordinary course after trial.

In the United States Alkali decision Chief Justice Stone analyzed the propriety of issuing writs such as that sought by plaintiff here.

> "It is evident that hardship is imposed on parties who are compelled to await a correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases appellate courts are reluctant to interfere with decisions of lower courts...

> which they are competent to decide and which are reviewable in the regular course of appeal." 325 U.S. at 202-203.

This statement of the law is fully applicable to Hoehn's instant petition to this Court for the issuance of a common law writ of certiorari.

By way of summary to the above, we respectfully assert that the writ requested should be denied for three reasons. First, the rulings are not final judgments and the policy against piecemeal review, in a factual vacuum, of what may turn out to be moot issues, militates against current consideration. Secondly, they are reviewable in the ordinary course of apellate events by the Third Circuit Court of Appeals. Finally, they clearly do not present the extraordinary situation in which this Court ought to exercise its discretion to intervene in these proceedings at this juncture.

CONCLUSION

For the foregoing reasons, plaintiff's petition for the issuance of the extraordinary writ of mandamus and the extraordinary common law writ of certiorari should be denied.

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Petitioner's Reply Brief

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No. 81-1105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

IN RE RUSSEL F. HOEHN

Petitioner

REPLY BRIEF OF PETITIONER

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February 8, 1982

QUESTIONS PRESENTED

The questions as presented in the Petition dated December 7, 1981 are repeated and are incorporated by reference herein as if set forth verbatim and are made a part hereof (Pp-2).

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STATEMENT OF CASE

Petitioner's statement of the case has been presented in the Petition (Pp-12). Since there are some factual disputes, their resolution must rest with the trier of the fact.

REASONS WHY WRITS SHOULD BE GRANTED

POINT I

THE CONSTITUTION OF THE UNITED STATES, AN ACT OF CONGRESS AND THE FEDERAL RULES OF CIVIL PROCEDURE ALL PROVIDE FOR A TRIAL BY JURY IN LEGAL ACTIONS.

Respondents have adopted a position that there can be no trial by jury in an action in which there are both equitable and legal issues combined in the same complaint. Yet, they have given no cogent reason why this Court should overrule itself and agree with their position.

It is not necessary, at this point, to determine whether the EMPLOYEE RETIREMENT SECURITY ACT OF 1974 (ERISA), 29 U.S.C. §1132(a) (Pa-11) creates a cause of action in law or in equity. This is so because the petitioner also seeks relief under other principles of law -- such as quasi contract or restitution -- which are clearly legal matters and clearly triable by a jury. Moreover, it is equally clear

that petitioner is not required to elect his remedies at any time prior to the end of trial of this action and, indeed, may choose not to make an election of remedies but may opt to have a jury make the election for him.

There is no doubt but that the jurisdiction of the United States District Court rests on the provisions of ERISA. However, as the petitioner has outlined, once this jurisdiction has attached, it extends to all other claims that may be asserted in the same action. And this is so whether the additional claims are legal or equitable. The respondents are taking the position that ERISA gives rise to an action in equity and that since the jurisdiction of the District Court is based on ERISA, then somehow or other -- by a logic that escapes the petitioner -- all of the legal issues raised in the same complaint become equitable. To put it another way, the respondents would have this Court hold that the same set of facts cannot give

rise to alternative remedies which may be legal or equitable in nature. This position certainly has no support in modern jurisprudence.

In Ross v. Bernhard, 396 U.S. 531, 24 L.Ed.2d 729, 90 S. Ct. 733 (1970), this Court addressed itself directly to the very argument the respondents are raising in this case, that a statutory cause of action negates the Seventh Amendment in toto. As Mr. Justice White pointed out, at 533:

> "The Seventh Amendment preserves to litigants the right to jury trial in suits at common law--'not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered...- In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.'"

It is submitted, that this is exactly the situation in the present case.

The position of the Court was summed up in Beacon Theatres, Inc. v. Westover, 39 U.S. 500, 79 S.Ct. 948, 3 L. Ed.2d. 988 (1959) at 509, where it held that:

> "This is not only in accord with the spirit of the Rules and the Act but is required by the provision in the Rules that '(t)he right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserve...inviolate'".

In a footnote to his opinion, Mr. Justice Black noted that:

> "16. Fed. Rules Civ. Proc., 38(a). In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: 'Such rule shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by a jury at at common law and as declared by the Seventh Amendment to the Constitution.' 28 USC § 2072. The Seventh Amendment reads: 'In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be

otherwise reexamined in any court of the United States than according to the rules of the common law.'"[1]

1. 28 USCA § 2072. Rules of Civil Procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174 § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348.

POINT II

THIS COURT SHOULD REAFFIRM ITS DECISION IN DAIRY QUEEN, INC. v. WOOD, 369 U.S. 469, 82 S. Ct. 894, 8 L.Ed.2d. 44 (1962) WHICH HELD THAT MANDAMUS IS A PROPER MEANS OF SECURING THE RIGHT TO A JURY TRIAL OF LEGAL ISSUES WHEN SUCH RIGHTS HAS BEEN DENIED BY A TRIAL COURT.

When this Court spoke on the propriety of mandamus to secure the right to trial by jury in Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L.Ed. 2d. 44 (1962), it made it crystal clear that mandamus was an appropriate remedy.

Speaking for the Court, at 471, supra, Mr. Justice Black held that:

> "Our decision reversing that case not only emphasizes the responsibility of the Federal Court of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances which in view of the flexible proced-

> ures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost to a prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented a 'incidental' to equitable issues or not."

The reasoning of this Court seems clear. If there is a constitutionally protected right to a trial by jury of legal issues, and if this right has not been abrogated by modern pleading techniques which permit legal and equitable claims to be presented in the same complaint, then it follows that there must be a remedy if that right is violated.

Moreover, in the interests of justice and economy, it seems clear that the remedy should be the most direct and economical means of securing the rights.

In this case, the defendants argue that mandamus is not an appropriate remedy because the plaintiff always has a remedy of appeal on the trial of the action. The defendants' contention is correct only if

one is prepared to disregard the decisions of this Court and to accept the necessity and desirability of a trial, appeals following the trial, and a re-trial of the action.

It is submitted that the latter tedious process is an unreasonable burden on the time of the courts and imposes needless expense on the parties. Modern trial tactics, like modern pleadings, are designed to bring as many issues as possible before a court for a determination in an orderly fashion. Indeed, it was for this reason that modern code pleading was designed.

It is submitted that the law, as determined by this Court, entitles the plaintiff to a trial by jury in this matter.

Respondents, in their brief (Rb12) rely heavily on their interpretation of Rule 26 of this Court pertaining to the issuance of extraordinary writs. They cite the text of the Rule together with an assortment of cases arising out of various

courts. Curiously, they do not cite the leading case decided in this Court construing mandamus, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d. 988 (1959), in which (at 511) Mr. Justice Black sums the Court's position up as follows:

> "Respondent claims mandamus is not available under the All Writs Act, 28 USC § 1651. Whatever the differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." (Citations omitted.)[2]

Thus, it appears that the "salient provisions" of Supreme Court Rule 26 have been defined by this Court to include preserving the right to a trial by jury.

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2. 28 USCA § 1651. Writs.
(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

Accordingly, it seems very clear that, while the Court Rules provide that exceptional circumstances must warrant the exercise of its discretionary powers, the deprivation of the right to trial by jury is an exceptional circumstance under the explicit holding of the Beacon Theatres, Inc. case, supra. Surely, a Court that has the power to make its own rules also has the power to construe and enforce a rule it has made.

POINT III

THIS COURT SHOULD REFUSE RESPONDENTS' REQUEST THAT IT OVERRULE ITSELF AND ACT TO STRIP PETITIONER OF HIS SETTLED RIGHT TO A JURY TRIAL OF LEGAL ISSUES.

It is an historical fact that the Seventh Amendment to the Constitution of the United States was ratified to limit the power of the Federal Government. Clearly, the Federal Rules of Civil Procedure which are adopted pursuant to a federal statute, must operate not only within the limits imposed by the Seventh Amendment but also within the limits imposed upon them by the Congress which has authorized them.

This Court and the Congress of the United States have given recognition to these principles.

The position of the Court was summed up in Beacon Theatres, Inc. v. Westover, supra, at 509, where it held that:

> "This is not only in accord with the spirit of the Rules and the Act but is required by the provisions in the Rules

> that '(t)he right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved...inviolate'".

In a footnote to his opinion, Mr. Justice Black noted that:

> "16. Fed. Rules Civ. Proc., 38(a). In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: 'Such rule shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.' 28 USC § 2072. The Seventh Amendment reads: 'In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.'"

The legal reasoning could not be stated more clearly. A constitutional limitation on government power exists. This limitation has been recognized by Congress in the legislation establishing the Federal Rules of Civil Procedure.

Both the limitation imposed by the Constitution and the limitation imposed by Congress have been upheld by this Court in the Beacon Theatres case, supra. To this date, the Constitution has not been amended to modify the right to trial by jury, Congress has not indicated any intention of removing its previous limitation, and this Court has shown no inclination to depart from its previous holdings. Yet, that is exactly what the respondents are attempting to persuade it to do in the case at bar. Clearly, they should not succeed.

It seems obvious to the petitioner that the merger of law and equity was a matter of convenience in pleading techniques to enable the parties to bring their issues before a court in an orderly and economical manner. This merger was never intended nor viewed as a means of stripping any party of his vested rights.

The rationale of Beacon Theatres, Inc. v. Westover, supra, and of Dairy

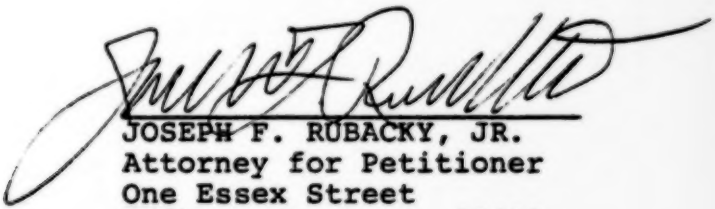
Queen, Inc. v. Wood, supra, has been cited by name and followed by this Court over the years. In Simler v. Conner, 372 U.S. 221, 9 L.Ed.2d. 691, 83 S. Ct. 609 (1963), this Court emphasized that claims for a sum of money are essentially legal in nature and are governed by the jury trial requirements of the Seventh Amendment.

In Curtis v. Loether, 415 U.S 189, 39 L.Ed.2d. 260, 94 S. Ct. 1005 (1974), this Court specifically noted that the right to a jury trial to enforce statutory rights was "as a matter too obvious to be doubted" (at 194).

This court went on to point out that it had often found the Seventh Amendment applicable to causes of action based on statutes.

CONCLUSION

This Court should refuse respondents' request that it overrule itself and act to strip petitioner of his right to a trial by jury of legal issues and grant the relief sought in the Petition.



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